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No. 04-

IN THE

Supreme Court of the United States

FRANKLIN SAVINGS CORP. *et al.*,

Petitioners,

v.

UNITED STATES *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Tenth Circuit erred when it concluded—in conflict with decisions of the Fourth, Fifth, Sixth and Ninth Circuits—that the waiver of federal sovereign immunity contained in the Bankruptcy Code is limited by the conditions attached to the altogether separate waiver of sovereign immunity contained in the Federal Tort Claims Act.

PARTIES TO THE PROCEEDINGS

In addition to the parties listed in the caption, Franklin Savings Association was Plaintiff-Appellant below, and is a Petitioner in this case; and the Federal Deposit Insurance Corporation was Defendant-Appellee below, and is a Respondent in this case.

RULE 29.6 STATEMENT

Petitioner Franklin Savings Corporation owns approximately 94% of Franklin Savings Association.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDINGS	ii
RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	iv
JUDGMENT FOR WHICH REVIEW IS SOUGHT	1
JURISDICTION	2
STATUTES OR OTHER PROVISIONS INVOLVED	2
STATEMENT	3
I. STATUTORY BACKGROUND	4
II. FACTUAL AND PROCEDURAL BACKGROUND	6
REASONS FOR GRANTING THE PETITION	9
I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE FOURTH, FIFTH, SIXTH AND NINTH CIRCUITS	9
II. THIS CASE PRESENTS A JURISDICTIONAL ISSUE OF NATIONAL IMPORTANCE	17
CONCLUSION	21

TABLE OF AUTHORITIES

CASES — Page

Anderson v. *FDIC*, 918 F.2d 1139 (4th Cir. 1990) 11, 12
Ashbrook v. *Block*, 917 F.2d 918 (6th Cir. 1990) ... 12
In re Berger, 16 B.R. 236 (Bankr. S.D. Fla. 1981) 15
Block v. *Neal*, 460 U.S. 289 (1983) 19
Cohens v. *Virginia*, 19 U.S. (6 Wheat.) 264 (1821) 18
Cunningham v. *Commissioner*, 165 B.R. 599 (N.D. Tex. 1993) 15
Dalehite v. *United States*, 346 U.S. 15 (1953) 4
Excel Home Care, Inc. v. *United States Dep't of H.H.S.*, 316 B.R. 565 (D. Mass. 2004) 15
FDIC v. *Meyer*, 510 U.S. 471 (1994) 4, 18
Feres v. *United States*, 340 U.S. 135 (1950) 3, 5, 16
Florida Auto Auction of Orlando, Inc. v. *United States*, 74 F.3d 498 (4th Cir. 1996) 16
FSA v. *Director of OTS*, 742 F. Supp. 1089 (D. Kan. 1990), *rev'd*, 934 F.2d 1127 (10th Cir. 1991) 6, 7
FSA v. *Director of OTS*, 934 F.2d 1127 (10th Cir. 1991) 7
FSA v. *OTS*, 821 F. Supp. 1414 (D. Kan. 1993), *aff'd*, 35 F.3d 1466 (10th Cir. 1994) 6
FSA v. *OTS*, 35 F.3d 1466 (10th Cir. 1994) 7
FSA v. *United States*, 46 Fed. Cl. 533 (2000), *reconsideration denied*, 56 Fed. Cl. 720 (2003), *aff'd*, 97 Fed. Appx. 331 (Fed. Cir. 2004), *cert. denied*, 73 U.S.L.W. 3565 (U.S. Nov. 28, 2004) (No. 04-693) 8
FSC v. *United States*, 970 F. Supp. 855 (D. Kan. 1997), *aff'd*, 180 F.3d 1124 (10th Cir. 1999) 7, 8

TABLE OF AUTHORITIES—continued

Page

FSC v. *United States*, 180 F.3d 1124 (10th Cir. 1999) 7, 8

Gingold v. *United States (In re Shelby County Healthcare Servs. of Al., Inc.)*, 80 B.R. 555 (Bankr. N.D. Ga. 1987) 15

In re Healthback, L.L.C., 226 B.R. 464 (Bankr. W.D. Okla. 1998) 15

Howell v. *United States*, 932 F.2d 915 (11th Cir. 1991) 17

Indian Towing Co. v. *United States*, 350 U.S. 61 (1955) 19

Inslaw, Inc. v. *United States (In re Inslaw, Inc.)*, 76 B.R. 224 (Bankr. D.D.C. 1987) 15

Kawananakoa v. *Polybank*, 205 U.S. 349 (1907) ... 19

Kenny v. *Block (In re Kenny)*, 75 B.R. 515 (Bankr. E.D. Mich. 1987) 15

Kokkonen v. *Guardian Life Ins. Co. of Am.*, 511 U.S. 375 (1994) 18

Myers v. *United States*, 17 F.3d 890 (6th Cir. 1994) 17

In re Orthopedic Bone Screw Prod. Liab. Litig., 264 F.3d 344 (3d Cir. 2001) 16

Payne v. *Hook*, 74 U.S. (7 Wall.) 425 (1868) 18

Prudential Lines, Inc. v. *United States Mar. Admin. (In re Prudential Lines, Inc.)*, 79 B.R. 167 (Bankr. S.D.N.Y. 1987) 15

In re St. Johns Home Health Agency, Inc., 173 B.R. 238 (Bankr. S.D. Fla. 1994) 15

Sullivan v. *Hiser (In re St. Mary Hosp.)*, 123 B.R. 14 (E.D. Pa. 1991) 15

Sullivan v. *Town & Country Home Nursing Servs., Inc. (In re Town & Country Home Nursing Servs., Inc.)*, 963 F.2d 1146 (9th Cir. 1992) 3, 13, 15

TABLE OF AUTHORITIES—continued

Page

TPI Int'l Airways, Inc. v. *FAA (In re TPI Int'l Airways, Inc.)*, 141 B.R. 512 (Bankr. S.D. Ga. 1992) 15

United States Dep't of H.H.S. v. *James*, 256 B.R. 479 (W.D. Ky. 2000) 15

University Med. Ctr. v. *Sullivan (In re University Med. Ctr.)*, 973 F.2d 1065 (3d Cir. 1992) 14

Zayler v. *USDA (In re Supreme Beef Processors)*, 391 F.3d 629 (5th Cir. 2004) 10, 11

CONSTITUTION AND STATUTES

U.S. Const. art. I, § 8, cl. 4 20

Legislative Reorganization Act of 1946, ch. 753, 60 Stat. 812 4

Bankruptcy Code, Pub. L. No. 95-598, 92 Stat. 2549 (1978) 5

Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 5

Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 5

11 U.S.C. § 106 ..... 2, 3, 5, 6, 8

28 U.S.C. § 2401 ..... 2, 5, 9

§ 2674 ..... 5, 16

§ 2675 5

§ 2680 8

42 U.S.C. § 405(h) 14

SCHOLARLY AUTHORITIES

Urban A. Lester & Michael F. Noone, *Litigation With the Federal Government* (3d ed. 1994) 4

1 William L. Norton, Jr., *Norton Bankruptcy Law & Practice* (rev. 2d ed. 2004) 9

TABLE OF AUTHORITIES—continued

Page

2 Alan N. Resnick & Henry J. Sommer, *Collier on Bankruptcy* (rev. 15th ed. 2003) 5

2A Norman J. Singer, *Sutherland on Statutes and Statutory Construction* (6th ed. 2000) 12

14 Charles Alan Wright et al., *Federal Practice and Procedure: Jurisdiction* (3d ed. 1998)..... 4

OTHER AUTHORITY

The Federalist No. 42 (James Madison) 20

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners Franklin Savings Corporation ("FSC") and Franklin Savings Association ("FSA"; collectively, "Franklin Savings") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

The decision of the court of appeals is reported at 385 F.3d 1279, and is reproduced in the Appendix to this Petition ("Pet. App.") at 1a-17a. The district court's memorandum and order dismissing the complaint is unreported, and is reproduced at Pet. App. 18a-30a. The order of the United States Bankruptcy Court for the District of Kansas is reported at 296 B.R. 521, and is reproduced at Pet. App. 31a-46a.

JURISDICTION

The court of appeals entered its judgment on October 7, 2004, Pet. App. 1a, and denied rehearing and rehearing en banc on December 29, 2004, *id.* at 47a-48a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). On March 17, 2005, Justice Breyer extended the time for filing a petition in this case to and including April 28, 2005.

STATUTES OR OTHER PROVISIONS INVOLVED

Section 106 of the Bankruptcy Code, 11 U.S.C. § 106, provides in pertinent part:

> (b) A governmental unit that has filed a proof of claim in the case is deemed to have waived sovereign immunity with respect to a claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which the claim of such governmental unit arose.
>
> (c) Notwithstanding any assertion of sovereign immunity by a governmental unit, there shall be offset against a claim or interest of a governmental unit any claim against such governmental unit that is property of the estate.

28 U.S.C. § 2401(b) provides:

> (b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

STATEMENT

Section 106 of the Bankruptcy Code is a simple, important, and just component of the bankruptcy system. It provides that when the United States seeks to recover money from a bankruptcy estate (by filing a proof of claim), it waives sovereign immunity and thereby exposes itself to liability for related counterclaims (namely, counterclaims stemming from the same transaction or occurrence). 11 U.S.C. § 106(b). For other counterclaims, the estate may still recover from the government, but that recovery is limited to an offset against the government's claim. *Id.* § 106(c). This is only fair. If the government wishes to collect from the bankruptcy estate, the bankruptcy estate should be able to recover from the government. See *Sullivan* v. *Town & Country Home Nursing Servs., Inc. (In re Town & Country Home Nursing Servs., Inc.)*, 963 F.2d 1146, 1155 (9th Cir. 1992) ("The legislative history of section 106 indicates that Congress meant to ... subject[] the government to an automatic exposure to liability as the price of its participation in the distribution of the bankruptcy estate.").

Until the decision below, every court of appeals to consider the issue (and nearly every bankruptcy court) had properly recognized that § 106 is a fully operative waiver of sovereign immunity that is altogether independent from, and has no necessary relationship to, the Federal Tort Claims Act (FTCA). They are separate waivers of sovereign immunity, and nothing in either statute links the two. Neither provision creates a cause of action; each simply waives the government's sovereign immunity against state-law tort claims. See *Feres* v. *United States*, 340 U.S. 135, 141 (1950). But now the Tenth Circuit has held—in a decision that, according to the United States itself, conflicts with a recent decision of the Fifth Circuit (and further conflicts with decisions of the Fourth, Sixth and Ninth Circuits)—that the conditions that limit the FTCA waiver of sovereign immunity also limit § 106.

This issue is fundamentally important and requires national uniformity, for it speaks to the very jurisdiction of the federal courts, the extent of the federal government's waiver of sovereign immunity, and the national system of bankruptcy. The scope of a sovereign's waiver of immunity defines the federal courts' jurisdiction to hear a case. *FDIC* v. *Meyer*, 510 U.S. 471, 475 (1994). The sovereign immunity of the United States is nationally defined, and demands national uniformity, and for that reason alone certiorari is warranted. From private litigants' perspective, certiorari is appropriate and uniformity is necessary for reasons of basic justice. Precisely because the United States' immunity is nationally defined, it would be manifestly unjust—and equally capricious—were actions permitted to proceed against that sovereign in certain federal courts but not in others. To permit this disuniformity to persist would undoubtedly encourage forum-shopping. Such a result is all the worse in the bankruptcy context, which demands national uniformity of law to permit the orderly administration of bankruptcy estates.

I. STATUTORY BACKGROUND

1. The FTCA is one, but "by no means the only," statute by which the federal government waives sovereign immunity.[1] Enacted in 1946, see Legislative Reorganization Act, tit. iv, ch. 753, 60 Stat. 812, 842-47, it was meant to alleviate the burden on Congress created by the thousands of private claim bills that were filed every year with Congress because sovereign immunity foreclosed recovery through the courts, see *Dalehite* v. *United States*, 346 U.S. 15, 24-25 & n.9 (1953). In order to permit tort claims to proceed, the FTCA performs several functions that are important here. First, like § 106 of the Bankruptcy Code, it waives the United States' sovereign

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[1] *See* 14 Charles Alan Wright et al., *Federal Practice and Procedure: Jurisdiction* § 3656 n.3 (3d ed. 1998) (listing statutes permitting recovery against the United States); Urban A. Lester & Michael F. Noone, *Litigation With the Federal Government* § 13.101, at 371 (3d ed. 1994) (same).

immunity for certain tort claims. 28 U.S.C. § 2674. It does so "in the same manner and to the same extent as a private individual under like circumstances." *Id.*; see *Feres*, 340 U.S. at 142. At the same time, however, it places conditions on the waiver of sovereign immunity. For instance, any action brought in reliance upon this waiver of sovereign immunity must satisfy an administrative exhaustion requirement, 28 U.S.C. § 2675, and a specially imposed statute of limitations, *id.* § 2401. Importantly, the FTCA does not create a substantive cause of action; rather, it simply permits litigants to proceed against the government with existing causes of action that would otherwise be barred by sovereign immunity. See *Feres*, 340 U.S. at 141 ("[T]his is not the creation of new causes of action but acceptance of liability under circumstances that would bring private liability into existence."); see *infra* Section IV.4.

2. Section 106 was enacted as part of the Bankruptcy Code of 1978. See Pub. L. No. 95-598, § 106, 92 Stat. 2549, 2555-56.[2] Simply put, "Section 106 defined the circumstances necessary for a valid waiver of sovereign immunity in bankruptcy cases." 2 Alan N. Resnick & Henry J. Sommer, *Collier on Bankruptcy* § 106.LH[1], at 106-42 (rev. 15th ed. 2003). Those circumstances are plain: When the government files a proof of claim, it waives sovereign immunity "with respect to a claim against such governmental unit ... that arose out of the same transaction or occurrence." 11 U.S.C. § 106(b) (originally codified at § 106(a)). For other claims, sovereign immunity is still waived, but limited to an offset

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[2] It was amended, in ways that are not relevant here, in the Bankruptcy Reform Act of 1994. Pub. L. No. 103-394, § 113, 108 Stat. 4106, 4117. *See* 2 *Collier on Bankruptcy*, *supra*, § 106LH[4], at 106-45 to -46 (discussing the 1994 amendments).

The recently enacted bankruptcy reform act contains no changes to § 106. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23.

against the government's claim in bankruptcy. *Id.* § 106(c) (originally codified at § 106(b)).

Nothing in § 106(b) or (c) incorporates, cross-references or in any way refers to the earlier enacted FTCA. This omission is significant, for Congress was well aware of its power to limit its waiver of sovereign immunity, which it did in numerous other respects. The waiver in section 106(a), for instance, is limited to certain enumerated statutory sections. See *id.* § 106(a)(1) (identifying 60 provisions of the bankruptcy code as to which sovereign immunity is waived). Section 106(b) limits its waiver to compulsory counterclaims. And Section 106(c) limits (to the value of an offset) claims that would not qualify as compulsory counterclaims.

II. FACTUAL AND PROCEDURAL BACKGROUND

1. Petitioner FSA was, until its premature demise, a stock savings association whose primary business was to invest in mortgage-related assets. It was taken over in 1990 by the federal government, which caused FSA immediately to cease its business and completed FSA's liquidation in 1992. The reason stated by the Office of Thrift Supervision ("OTS") was that FSA was "'in an unsafe and unsound condition to transact business.'" Pet. App. 32a. FSA and FSC (the 94% shareholder of FSA) strongly disagreed. Accordingly, FSA and FSC filed suit in an effort to regain control of the business. They challenged the appointment of the Resolution Trust Corporation ("RTC") as conservator, *FSA* v. *Director of OTS*, 742 F. Supp. 1089 (D. Kan. 1990), *rev'd*, 934 F.2d 1127 (10th Cir. 1991) (*Franklin Savings I*), as well as the subsequent conversion of the conservatorship into a receivership, see *FSA* v. *OTS*, 821 F. Supp. 1414 (D. Kan. 1993), *aff'd*, 35 F.3d 1466 (10th Cir. 1994) (*Franklin Savings II*).

The United States District Court for the District of Kansas, the first court to review OTS's actions and conclusions—and indeed, to this date, the only court to consider any meaningful factual record on this issue—concluded that OTS erred in de-

termining that FSA was in an unsafe and unsound condition to transact business. The court stated that "the safety and soundness issues raised by the OTS are unconvincing since Franklin had GAAP capital of $387 million on December 31, 1989, and an economic value of not less than that amount." *Franklin Savings I*, 742 F. Supp. at 1122.[3] That conclusion, however, was overturned by the Tenth Circuit on the theory that the district court had given OTS insufficient deference and considered evidence outside the narrow administrative record compiled by OTS. *Franklin Savings I*, 934 F.2d at 1137. Franklin Savings' efforts to regain control of its business were ultimately unavailing, and nothing in this case for damages is aimed at changing that outcome. See *id.* (denying challenge to imposition of conservatorship); *Franklin Savings II*, 35 F.3d at 1470-71 (denying challenge to imposition of receivership).

In the meantime, following RTC's liquidation of FSA, Franklin Savings filed for Chapter 11 bankruptcy protection. See *FSC* v. *United States*, 970 F. Supp. 855, 860 (D. Kan. 1997) (describing same), *aff'd*, 180 F.3d 1124 (10th Cir. 1999); see also 180 F.3d at 1127. Having been thwarted in its efforts to recover control of its business, Franklin Savings filed an adversary complaint in the bankruptcy. Franklin Savings alleged that the government acted tortiously by liquidating FSA during the conservatorship, when it was supposed to be *conserving* the institution. (Indeed, the order from the Director of OTS specifically stated that the conservatorship was "not for the purpose of liquidation.") Thus, Franklin Savings sought compensation for the damages it suffered by the de-

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[3] *See also* 742 F. Supp. at 1120 ("OTS's conclusion ... is without reasonable basis"); *id.* at 1118 ("OTS's [analysis] is based on an inappropriate application of a regulation"); *id.* ("OTS wanted to avoid embarrassment"); *id.* at 1120 ("OTS's [analysis] ... is misleading"); *id.* at 1126 ("OTS acted inappropriately in placing Franklin in conservatorship, and ... the OTS lacked any factual basis which would justify its appointment of a conservator").

struction of the business' value and dissipation of its assets. This complaint was brought under the auspices of the government's waiver of sovereign immunity contained in the FTCA because, at that time, the government had filed no claim that FSC could use as a basis to invoke jurisdiction under § 106 of the Bankruptcy Code. It was dismissed, however, under the "discretionary function" exception to the FTCA, 28 U.S.C. § 2680. See 970 F. Supp. at 864-67. The dismissal was affirmed on appeal. See 180 F.3d at 1127, 1143. Franklin Savings then filed the complaint at issue here.[4]

2. The instant complaint alleges that the United States, acting through the RTC, committed a variety of torts in the course of the takeover and management of FSA, including negligence and numerous breaches of fiduciary duty. In contrast to Franklin Savings' earlier allegations, this complaint seeks relief that is permitted by the federal government's waiver of sovereign immunity under § 106 of the Bankruptcy Code, 11 U.S.C. § 106(b), (c), rather than the separate waiver of sovereign immunity contained in the FTCA. In particular, Franklin Savings argued that jurisdiction existed because the federal government filed multiple claims against the FSC bankruptcy estate after FSC had filed its initial tort complaint seeking jurisdiction under the FTCA.

The bankruptcy court dismissed the complaint, Pet. App. 46a, and the district court affirmed, *id.* at 30a. Although the bankruptcy court properly recognized that § 106 constitutes a waiver of sovereign immunity separate and apart from the FTCA, *id.* at 41a-42a, it mistakenly imported all of the limitations attached to the FTCA's waiver of sovereign immunity

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[4] Franklin Savings also unsuccessfully sought just compensation under the Takings Clause and for breach of contract. *See FSC v. United States*, 46 Fed. Cl. 533 (2000), *reconsideration denied*, 56 Fed. Cl. 720 (2003), *aff'd*, 97 Fed. Appx. 331 (Fed. Cir. 2004), *cert. denied*, 73 U.S.L.W. 3565 (U.S. Mar. 28, 2005) (No. 04-693).

into § 106. It did so on the theory that the FTCA is a "substantive" cause of action, *id.* at 42a; see also *id.* (referring to the FTCA as an "independent legal basis"), and that Franklin Savings' claims must have been brought pursuant to this supposed cause of action, *id.* On that basis, it concluded that all of the conditions that limit the FTCA's waiver of sovereign immunity also apply to actions brought pursuant to the § 106 waiver of sovereign immunity—including the FTCA's two-year statute of limitations. *Id.* at 42a-44a. And, because it concluded that the FTCA's statute of limitations was not satisfied, see 28 U.S.C. § 2401(b), it dismissed the complaint. Pet. App. 46a. The district court affirmed for substantially the same reasons. *Id.* at 18a-30a.

3. On appeal, the Tenth Circuit adopted the same reasoning. Although there was no question and no dispute that the requirements of § 106 were met, Pet. App. 6a, the court inquired whether the requirements of the FTCA also had been satisfied. It treated the FTCA as a cause of action, rather than simply a waiver of sovereign immunity. *Id.* at 8a; see also *id.* at 14a. The court held that the FTCA is the "*exclusive* avenue to bring a tort claim against the United States," *id.* at 8a (emphasis added), § 106 notwithstanding. On the basis of that predicate holding, it reasoned that the FTCA's two-year statute of limitations applies here, and that the complaint must be dismissed because the statute was unmet. *Id.* at 14a.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE FOURTH, FIFTH, SIXTH AND NINTH CIRCUITS.

This Court's review is warranted to resolve the clear and well-developed conflict of authority among five federal courts of appeals concerning the relationship between the waivers of sovereign immunity contained in the FTCA and § 106 of the Bankruptcy Code. See 1 William L. Norton, Jr., *Norton*

Bankruptcy Law & Practice, § 14:12 (rev. 2d ed. 2004) (recognizing the conflict). Four courts of appeals (the Fourth, Fifth, Sixth and Ninth Circuits) have held that the United States' waiver of sovereign immunity under the FTCA is wholly separate from the waiver contained in the Bankruptcy Code, and that the limitations attached to the FTCA's waiver have no application in the bankruptcy context. (In addition, the Third Circuit has adopted precisely the same reasoning with regard to Medicare Act claims brought pursuant to the § 106 waiver of sovereign immunity.) The decision below, by contrast, conflates the two provisions, and holds that the FTCA's limitations do apply to § 106. And, in the course of so doing, the decision below treats the FTCA as a substantive cause of action, in further conflict with decisions of this Court and at least four other courts of appeals. Given the fundamental importance of waivers of sovereign immunity to the jurisdiction of the federal courts, and the manifest unfairness of permitting tort suits against the federal government to proceed in certain jurisdictions when they are barred in others, the need for this Court's review is plain. The necessity for uniformity in the law of bankruptcy and in the administration of bankruptcy estates emphasizes all the more the need for review.

1. The overwhelming weight of authority supports the view, rejected by the court below, that the FTCA and § 106 operate as entirely independent waivers of the United States' sovereign immunity. First and foremost is the decision of the Fifth Circuit in *Zayler* v. *USDA (In re Supreme Beef Processors)*, which, like the decision below, concerned the application of the FTCA's statute of limitations to claims under § 106. 391 F.3d 629, 633 (5th Cir. 2004). Just as in this case, the United States argued that all of the limitations upon an FTCA action apply to a § 106 counterclaim. *Id.* at 635 ("USDA contends that if Supreme Beef's claim did not exist outside of bankruptcy because it does not meet the FTCA's substantive requirements, then it cannot be brought as a coun-

terclaim under § 106(c)"). The Fifth Circuit squarely rejected the government's argument that the FTCA's limitations attach to § 106. *Id.* at 635-36. It rejected the predicate assumption that "the FTCA's substantive requirements are ... the only avenues for relief," *id.* at 635, and concluded that to import the FTCA's requirements into the bankruptcy arena "would render the plain language of § 106(c) meaningless," *id.* at 636.

The United States itself has recognized that *Zayler* squarely conflicts with the decision in this case. Following the adverse decision in *Zayler*, the Secretary of Agriculture—represented by the same Department of Justice attorneys who have handled this case—sought rehearing en banc on the theory that *Zayler* "conflicts with the recent authoritative decision of the Tenth Circuit in *In re Franklin Sav. Corp.*" See Petition for Rehearing En Banc, at *Required Statement of Counsel for Rehearing En Banc*, *Zayler* v. *USDA*, No. 03-41345 (5th Cir. filed Jan. 2005); accord *id.* at 10 ("The panel's ruling ... directly conflicts with a recent decision of the Tenth Circuit" (capitalization altered)). In short, the conflict between the decision below and the decision of the Fifth Circuit is square, clear, and acknowledged by the government.

But the conflict in the circuits is much broader than just the Tenth and Fifth Circuits. Like the Fifth Circuit, the Fourth, Sixth and Ninth Circuits have concluded that the conditions attached to the FTCA's waiver of sovereign immunity do not apply to actions authorized by § 106's separate waiver of sovereign immunity. In *Anderson* v. *FDIC*, the Fourth Circuit reversed the district court's dismissal of a suit against the FDIC. 918 F.2d 1139 (4th Cir. 1990). The district court had concluded that "the Tort Claims Act [takes] precedence" over § 106, *id.* at 1142, and it therefore dismissed the complaint because the plaintiff had failed to satisfy various requirements of the FTCA, *id.* at 1141 & n.2. The Fourth Circuit rejected this conclusion. It held that to apply the FTCA's limitations to every § 106 action would render § 106 "meaningless." *Id.*

at 1143-44. Thus, in order to "give effect to both statutes," the Court concluded that "'the Bankruptcy Code's explicit waivers of sovereign immunity are entirely distinct, separate and independent from and in addition to those found in ... the FTCA.'" *Id.* at 1144 (omission in original).

Similarly, in *Ashbrook* v. *Block*, the Sixth Circuit held that the FTCA's limitations do not apply when § 106 is at issue. 917 F.2d 918 (6th Cir. 1990). Important for present purposes, the Sixth Circuit employed yet another mode of analysis—a further division of authority that demonstrates the need for this Court's review. Unlike the Fourth Circuit, which relied upon the rule against superfluities,[5] the Sixth Circuit focused on whether declining to apply the FTCA's limitations to § 106 actions would amount to a "repeal [of] the operation of the FTCA's well-established exhaustion requirement in the bankruptcy context," and noted that "repeals by implication are not favored by the courts," *id.* at 922. It determined, nonetheless, that the FTCA does not limit § 106. The legislative history of the Bankruptcy Reform Act, it reasoned, demonstrated that § 106 was meant to operate in different fashion from the FTCA. *Id.* at 922-23. Notably, it repeatedly relied on a bankruptcy court decision which squarely had held that the FTCA's limitations do not apply to § 106. *Id.* at 923, 924 (citing *Kenny* v. *Block (In re Kenny)*, 75 B.R. 515 (Bankr. E.D. Mich. 1987)).

The Ninth Circuit has ruled likewise. In *In re Town & Country Home Nursing Services*, the United States—through the Department of Health and Human Services—again sought to impose non-bankruptcy limitations on tort claims brought under authority of the § 106 waiver of sovereign immunity. The Secretary argued that the claim was barred because the

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[5] *See* 2A Norman J. Singer, *Sutherland on Statutes and Statutory Construction* § 46.06, at 181-86 (6th ed. 2000) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant ...." (footnote omitted)).

plaintiff failed to satisfy the FTCA's administrative exhaustion requirement (as well as a similar requirement under the Medicare Act). 963 F.2d at 1154. The Ninth Circuit rejected this argument. After noting a division of authority among bankruptcy courts on this issue, the court concluded that "'where there is an independent basis for bankruptcy court jurisdiction, exhaustion of administrative remedies pursuant to other jurisdictional statutes is not required.'" *Id.* And, like the Sixth Circuit, the Ninth Circuit determined that the legislative history of the Bankruptcy Code supported this interpretation.[6]

2. In direct conflict with these four circuits, the decision below is the sole decision of a court of appeals that imports the limitations on the FTCA's waiver of sovereign immunity into the bankruptcy context. The court below treated the FTCA like a substantive cause of action, and held that it "provides the exclusive avenue to bring a tort claim against the United States." Pet. App. 8a. On that basis, it determined that the FTCA's limitations apply to Franklin Savings' claim, which it therefore deemed untimely. *Id.* at 9a.

In response to Franklin Savings' argument that sovereign immunity was waived under § 106 in this case, and that the FTCA and its limitations do not apply, the court simply begged the question. Rather than asking whether the FTCA's statute of limitations is even relevant to § 106, it framed the issue as whether § 106 "abrogat[es]" this statute of limitations, and it went on to assert that § 106 "does not permit Franklin to file an *untimely* counterclaim," Pet. App. 12a

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[6] *See* 963 F.2d at 1155:

> At the time of the Bankruptcy Code's passage, Congress was aware that its prior enactments, such as the FTCA, had already prescribed certain conditions for the government's waiver of sovereign immunity. The legislative history of section 106 indicates that Congress meant to alter this landscape by subjecting the government to an automatic exposure to liability as the price of its participation in the distribution of the bankruptcy estate.

(emphasis added)—which of course presupposes that the statute of limitations applied and rendered the counterclaim untimely in the first place.

Nor did the court below seriously attempt to distinguish the contrary decisions of the Fourth and Sixth Circuits. It did not address those courts' fundamental rulings that the requirements of the FTCA do not apply to § 106. It instead rested upon the slender reed that the administrative exhaustion requirement at issue in those cases differs from the statute of limitations at issue here. Pet. App. 16a. It offered no textual basis or any logical rationale to explain why the FTCA's statute of limitations would apply when its administrative exhaustion requirement does not. And it could not reasonably have done so—after all, the running of the FTCA's statute of limitations is triggered by the exhaustion of administrative remedies.

3. The conflict is deepened by analogous cases concerning the intersection between § 106 and tort provisions of the Medicare Act. The very same analysis that courts have applied in analyzing the FTCA and § 106 applies to the Medicare Act (as well as the Internal Revenue Code, and indeed any statute that waives in conditional fashion the sovereign immunity of the United States). Like the FTCA, the Medicare Act contains an administrative exhaustion requirement that divests federal courts of jurisdiction under certain circumstances. 42 U.S.C. § 405(h); see *University Med. Ctr.* v. *Sullivan (In re University Med. Ctr.)*, 973 F.2d 1065, 1072-73 (3d Cir. 1992). The Third Circuit, in accord with the four courts of appeals noted above—and in express reliance upon the Ninth Circuit's decision in *In re Town & Country*—concluded that "'where there is an independent basis for bankruptcy court jurisdiction, exhaustion of administrative remedies pursuant to other jurisdictional statutes is not required.'" 973 F.2d at 1073-74. Simply put, the Third Circuit has joined forces with the other courts of appeals—other than the court below—in concluding that non-bankruptcy limita-

tions on the federal government's waiver of sovereign immunity should not be imported into the bankruptcy context. See also *In re Town & Country*, 963 F.2d at 1154 (applying the same analysis to both FTCA and Medicare Act limitations, and concluding that neither statute's limitations period applies under § 106).

Moreover, as the court in *In re Town & Country* recognized years ago, *id.* at 1154, there is a deep division among the lower courts on this issue. This conflict encompasses cases concerning (as here) the FTCA, as well as cases in which claims against the government arose under the Medicare Act and the Internal Revenue Code.[7]

4. The conflict set forth above is highlighted, and the error of the decision below emphasized, by a closely related divi-

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[7] *Compare Kenny* v. *Block (In re Kenny)*, 75 B.R. 515, 521 (Bankr. E.D. Mich. 1987) ("The Bankruptcy Code waiver of sovereign immunity is separate and distinct from the FTCA waiver."), *Inslaw, Inc.* v. *United States (In re Inslaw, Inc.)*, 76 B.R. 224, 233-34 (Bankr. D.D.C. 1987) (same), *In re Healthback, L.L.C.*, 226 B.R. 464, 469 (Bankr. W.D. Okla. 1998) (holding that the Medicare Act's administrative exhaustion requirements do not apply to claims in bankruptcy), *Gingold* v. *United States (In re Shelby County Healthcare Servs. of Al., Inc.)*, 80 B.R. 555, 561 (Bankr. N.D. Ga. 1987) (same), *and Cunningham* v. *Commissioner*, 165 B.R. 599, 604 (N.D. Tex. 1993) (holding that Internal Revenue Code's exhaustion requirements do not apply in bankruptcy), *with Excel Home Care, Inc.* v. *United States Dep't of H.H.S.*, 316 B.R. 565, 569-74 (D. Mass. 2004) (concluding that the Medicare Act's requirements do apply in bankruptcy), *United States Dep't of H.H.S.* v. *James*, 256 B.R. 479, 481 (W.D. Ky. 2000) (same), *In re St. Johns Home Health Agency, Inc.*, 173 B.R. 238, 242-43 (Bankr. S.D. Fla. 1994) (same), *Sullivan* v. *Hiser (In re St. Mary Hosp.)*, 123 B.R. 14, 16-18 (E.D. Pa. 1991) (same), *and In re Berger*, 16 B.R. 236, 237-38 (Bankr. S.D. Fla. 1981) (same). *Cf. TPI Int'l Airways, Inc.* v. *FAA (In re TPI Int'l Airways, Inc.)*, 141 B.R. 512, 515-21 (Bankr. S.D. Ga. 1992) (holding that the § 106 waiver of sovereign immunity is independent from the FTCA, but applying a discretionary function exception nonetheless); *Prudential Lines, Inc.* v. *United States Mar. Admin. (In re Prudential Lines, Inc.)*, 79 B.R. 167, 182-83 (Bankr. S.D.N.Y. 1987) (same).

sion of authority concerning the fundamental question of what function the FTCA serves. In order to reach its mistaken conclusion that § 106 incorporates the limitations on the FTCA's waiver of sovereign immunity, the court below erroneously treated the FTCA as a cause of action. Citing the now-overruled district court opinion in *Zayler*, it held that to proceed under § 106, "'any substantive rights asserted must have an independent legal basis'"—which is certainly correct, given that § 106 merely waives immunity—but then mistakenly concluded that the FTCA is "[t]hat ... source" of law. Pet. App. 8a (quoting *Zayler* v. *United States*, 279 F. Supp. 2d 805, 814 (E.D. Tex. 2003)); *accord id.* at 9a ("the FTCA provides the exclusive avenue for pursuing [Franklin Savings'] claims against the United States").

This analysis misunderstands the FTCA, and conflicts directly with decisions of this Court and at least four courts of appeals. Nothing in the FTCA purports to create a cause of action. Rather, that statute permits the United States to be held liable "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. In short, it waives sovereign immunity for state-law (and occasionally federal-law) causes of action. But it creates no cause of action.

The contrary conclusion of the decision below conflicts with *Feres*, in which this Court recognized that the FTCA "is not the creation of new causes of action but acceptance of liability under circumstances that would bring private liability into existence." 340 U.S. at 141. The Third, Fourth, Sixth and Eleventh Circuits have explicitly affirmed this same principle, in further conflict with the decision below. See *In re Orthopedic Bone Screw Prod. Liab. Litig.*, 264 F.3d 344, 362 (3d Cir. 2001) ("the FTCA does not itself create a substantive cause of action against the United States; rather, it provides a mechanism for bringing a state law tort action against the federal government in federal court"); *Florida Auto Auction of Orlando, Inc.* v. *United States*, 74 F.3d 498, 502 (4th Cir.

1996) ("The Act does not create new causes of action .... Instead, the Act 'only serves to convey jurisdiction when the alleged breach of duty is tortious under *state* law, or when the Government has breached a duty under federal law that is analogous to a duty of care recognized by state law.'" (citation omitted)); *Myers* v. *United States*, 17 F.3d 890, 894 (6th Cir. 1994) ("The FTCA does not create a cause of action against the United States.... Rather, it constitutes consent to suit ...." (citations omitted)); *Howell* v. *United States*, 932 F.2d 915, 917 (11th Cir. 1991) ("The FTCA was not intended to create new causes of action; nor was it intended as a means to enforce federal statutory duties. Instead, Congress's chief intent in drafting the FTCA was simply to provide redress for ordinary torts recognized by state law." (citations and footnote omitted)).

This additional conflict only confirms what the first conflict described above established: The decision below badly misunderstands the nature and function of the FTCA. It has imposed the FTCA's limitations upon an unrelated statute, in square conflict with four courts of appeals, and its reason for so doing was the mistaken conclusion that the FTCA is a cause of action—a conclusion that further conflicts with the decisions of four courts of appeals. This Court's review is necessary to resolve these intractable conflicts.

II. THIS CASE PRESENTS A JURISDICTIONAL ISSUE OF NATIONAL IMPORTANCE.

In addition to the square, deep and irreconcilable conflicts among the courts of appeals set forth above, the issue presented is intrinsically important because it speaks to the scope of federal jurisdiction, the extent of the federal government's waiver of sovereign immunity, and the proper interpretation of federal bankruptcy law. Disuniformity is intolerable in any one of these areas; that the issue presented here reflects disuniformity with regard to all three demonstrates the necessity for this Court's review.

Federal courts possess only the jurisdiction bestowed upon them by Congress. *Kokkonen* v. *Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). When suit is brought against the federal government, "the 'terms of [the United States'] consent to be sued in any court define that court's jurisdiction to entertain the suit.'" *Meyer*, 510 U.S. at 475 (alteration in original)). The issue presented here concerns the scope of the United States' waiver of sovereign immunity under not just one, but two separate statutes. Thus, this case—and the accompanying persistent conflict among the courts of appeals—speaks to the very power of the federal courts. When they have this power, they must exercise it; when they do not have this power, they cannot. See *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given."). So, no matter which courts and which party are correct, an intolerable error is occurring. According to Franklin Savings and every court of appeals except the court below, the Tenth Circuit is refusing to exercise jurisdiction that it lawfully must. By contrast, according to the government and the court below, the federal courts have no jurisdiction to hear a claim like Franklin Savings', and the courts that permit such a claim to proceed are exercising jurisdiction that is not properly theirs. Either way, this Court's review is essential.

Such a jurisdictional conflict creates illogical and unjust disuniformity. Federal jurisdiction must be interpreted and applied uniformly, cf. *Payne* v. *Hook*, 74 U.S. (7 Wall.) 425, 430 (1868) (recognizing that "[t]he equity jurisdiction conferred on the Federal courts ... is uniform throughout the different States of the Union"), because any other rule is easily manipulable. A litigant whose claims are foreclosed in one federal court could simply file in another (subject, of course, to limitations of personal jurisdiction and venue).

The illogic of such disuniformity in the unitary system of federal jurisdiction is exacerbated here by the overlay of fed-

eral sovereign immunity. There is, of course, but one national government. To permit it to be sued for precisely the same conduct in Richmond and Dallas, but not in Kansas City, is intolerable. This state of affairs makes little sense as a practical matter. It causes unjust results in certain jurisdictions (either for the federal government or for private litigants), and it means that, whatever the proper interpretation of § 106, some courts are doing violence to bedrock principles of sovereign immunity, either by interpreting § 106 too narrowly or by interpreting it too broadly.

On the one hand, this Court long has recognized that to interpret a waiver of sovereign immunity in unduly narrow fashion is to work "hardship" upon litigants: """The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced."'" *Block* v. *Neal*, 460 U.S. 289, 298 (1983); see also *Indian Towing Co.* v. *United States*, 350 U.S. 61, 69 (1955) (the Court should not "as a self-constituted guardian of the Treasury import immunity back into a statute designed to limit it"). Conversely, a failure to give proper effect to a valid claim of sovereign immunity offends the sovereign's authority. See, *e.g.*, *Kawananakoa* v. *Polybank*, 205 U.S. 349, 353 (1907) ("A sovereign is exempt from suit ... because ... there can be no legal right as against an authority that makes the law on which the right depends."); see also *Indian Towing*, 350 U.S. at 69. Thus, no matter whether the Tenth Circuit is correct, or conversely the Fourth, Fifth, Sixth and Ninth Circuits are interpreting § 106 correctly, bedrock principles of sovereign immunity are being violated as matters currently stand. This Court's review is needed to ensure that sovereign immunity is properly applied in bankruptcy.

Finally, the importance of this issue and the impermissibility of an intercircuit conflict on it, is magnified by its intersection with the federal bankruptcy system, which has a constitutional mandate to be "uniform." The Constitution spe-

cifically provides that "[t]he Congress shall have Power ... To establish ... *uniform* Laws on the subject of Bankruptcies throughout the United States." U.S. Const. art. I, § 8, cl. 4 (emphasis added). It has been recognized since the Founding that uniformity in bankruptcy is necessary to prevent inconsistency and forum-shopping: "The power of establishing uniform laws of bankruptcy ... will prevent so many frauds where the parties or their property may lie or be removed into different States, that the expediency of it seems not likely to be drawn into question." *The Federalist* No. 42, at 278 (James Madison) (Isaac Kramnick ed., 1987).

At the end of the day, the standards that apply to the waiver of sovereign immunity in a bankruptcy proceeding are a matter of national importance on which there is a fundamental conflict in decisions by the courts of appeals. The United States has acknowledged this conflict and the Court should grant review to resolve the issue.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 28, 2005

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 03-3239

In re: FRANKLIN SAVINGS CORPORATION,
Debtor.

FRANKLIN SAVINGS CORPORATION;
FRANKLIN SAVINGS ASSOCIATION,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA;
FEDERAL DEPOSIT INSURANCE CORPORATION,
Defendants-Appellees.

Oct. 7, 2004

Before TACHA, Chief Judge, MURPHY, Circuit Judge, and CAUTHRON,* Chief District Judge.

MURPHY, Circuit Judge.

Franklin Savings Association (FSA), formerly a state chartered savings and loan association, and its parent, debtor Franklin Savings Corporation (FSC), a Kansas corporation (collectively, Franklin), appeal the dismissal of their adversary complaint against the United States and the Federal Deposit Insurance Corporation (FDIC). This is the latest in a long string of lawsuits Franklin has brought against the

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* The Honorable Robin J. Cauthron, Chief District Judge, United States District Court for the Western District of Oklahoma, sitting by designation.

government asserting claims in connection with the government's seizure, conservation and liquidation of FSA by the Resolution Trust Corporation (RTC) and its successor-in-interest, the FDIC.[1] The bankruptcy court granted the government's motion to dismiss, finding the claims were barred by the doctrine of claim preclusion. The district court affirmed. We conclude Franklin's claims are time-barred and, therefore, affirm the dismissal.[2]

I. BACKGROUND

The complete history of Franklin's litigation against the government is set forth in numerous published opinions, *see* n. 1, *supra*, and we briefly describe only the factual background necessary to resolve this appeal. The RTC was

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[1] *See Franklin Sav. Ass'n v. Dir., Office of Thrift Supervision*, 934 F.2d 1127 (10th Cir.1991) (holding that administrative record supported decision by Office of Thrift Supervision (OTS) to appoint RTC as FSA's conservator) [*Franklin I*]; *Franklin Sav. Ass'n v. Office of Thrift Supervision*, 35 F.3d 1466 (10th Cir.1994) (holding OTS's decision to change the RTC's function from conservator to receiver was not subject to judicial review) [*Franklin II*]; *Franklin Sav. Corp. v. United States*, 180 F.3d 1124 (10th Cir.1999) (holding that Franklin's negligence and breach of fiduciary duty claims against the RTC and the FDIC were barred by the discretionary function exception to the Federal Tort Claims Act) [*Franklin III*].

FSC also filed suit in the Court of Federal Claims, "essentially reiterating the same facts previously litigated in *Franklin I, II, III*, . . . this time asserting an action under the Tucker Act, 28 U.S.C. § 1491 (2000), for breach of contract, breach of fiduciary duty, and a taking under the Fifth Amendment to the United States Constitution." *Franklin Sav. Corp. v. United States*, 56 Fed. Cl. 720, 722 (Fed.Cl.2003), *aff'd*, 97 Fed. Appx. 331 (Fed.Cir.2004). These claims were also dismissed. *Id.; Franklin Sav. Corp. v. United States*, 46 Fed. Cl. 533 (Fed.Cl.2000) (dismissing the taking claim).

[2] After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. *See* Fed. R.App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

appointed conservator of FSA in 1990. The RTC's function was converted from conservator to receiver in 1992, and the RTC liquidated FSA. The FSC, which owns 94% of FSA's stock, then filed for Chapter 11 bankruptcy protection.

A. *The Franklin III Litigation*

In 1993, Franklin filed an adversary complaint against the RTC in bankruptcy court seeking damages under the Federal Tort Claims Act (FTCA) for negligence, breach of fiduciary duty, and conversion by the RTC while acting as conservator of FSA. *See Franklin III*, 180 F.3d at 1127; *Franklin Sav. Corp. v. United States*, 970 F.Supp. 855, 860 (D.Kan.1997). Franklin claimed that the RTC, while acting as a conservator, negligently failed to protect the assets and economic viability of FSA, in violation of certain directives and in breach of its fiduciary duty. *See Franklin III*, 180 F.3d at 1131. The district court withdrew the reference from the bankruptcy court, and Franklin amended its complaint to name the FDIC as the RTC's successor-in-interest. *Id.* at 1127.

The government moved to dismiss all claims for lack of subject matter jurisdiction, asserting the discretionary function exception to the FTCA's waiver of sovereign immunity applied.[3] Because resolution of the jurisdictional issue of whether the discretionary function exception applied was so intertwined with the merits of the case, the district court

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[3] The United States may not be sued absent a waiver of its sovereign immunity. *United States v. Mitchell*, 445 U.S. 535, 538, 100 S.Ct. 1349, 63 L.Ed.2d 607 (1980). The FTCA waives sovereign immunity for actions against the United States resulting from injuries caused by the negligent acts of governmental employees while acting in the scope of their employment. 28 U.S.C. § 1346(b)(1). The United States can be held liable "in the same manner and to the same extent as a private individual under like circumstances." *Id.* § 2674. Excluded from the FTCA's waiver of immunity, however, are claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty" by a federal agency or a federal employee. *Id.* § 2680(a).

treated the government's motion to dismiss as one for failure to state a claim under Fed.R.Civ.P. 12(b)(6). *Id.* at 1129. The district court granted the motion to dismiss.

On appeal to this court, Franklin argued for the first time that the government had waived its discretionary function immunity under Bankruptcy Code § 106, 11 U.S.C. § 106, when it filed a claim in bankruptcy against FSC's estate. *Franklin III*, 180 F.3d at 1129. This court held that Franklin had waived reliance on Bankruptcy Code § 106 by failing to assert that jurisdictional basis in its complaint, seeking leave to amend its complaint to do so, or in any way raising it in the district court. *Id.* at 1128-29.

This court affirmed the dismissal of Franklin's claims, holding that they were barred by the discretionary function exception because all of Franklin's allegations against the government involved discretionary conduct. *Id.* at 1133-39. The Supreme Court denied Franklin's petition for certiorari review. *Franklin Sav. Corp. v. United States*, 528 U.S. 964, 120 S.Ct. 398, 145 L.Ed.2d 310 (1999).

B. *The Franklin IV Complaint*

1. *Franklin Refiles Franklin III*

Three months after the Supreme Court denied review of *Franklin III*, Franklin filed another adversary complaint in this case ("*Franklin IV*"). The new complaint, at issue herein, "is virtually identical to [the] complaint filed in *Franklin III* with respect to the actual parties, allegations, and legal claims." *Franklin Sav. Corp. v. United States* (*In re Franklin Sav. Corp.*), 296 B.R. 521, 524 (Bankr.D.Kan.2002) (comparing claims in *Franklin IV* with those in *Franklin III*).

> The same plaintiffs have filed suit—FSA and FSC. The same defendants have been named, the United States and the FDIC as successor-in-interest to the RTC. The factual allegations are exactly the same, restated from

> the second amended complaint in *Franklin III* virtually verbatim. Each of the claims the district court dismissed in the prior action are restated in the instant complaint, also *verbatim* . . . . As in the prior action, the plaintiffs seek money damages in the amount of $820 million.

Id.

Franklin does not dispute the bankruptcy court's characterization of the two suits. Indeed, its position is that it has simply refiled its *Franklin III* action in *Franklin IV*, and it concedes that all of the causes of action in both *Franklin III* and *Franklin IV* sound in tort. *See* Aplt. Opening Br. at 10, 30; Aplt.App. at 178.

2. *Franklin Bases Franklin IV on Bankruptcy Code § 106*

Franklin IV does, however, posit a new legal basis for Franklin's contention that the government has waived sovereign immunity: Bankruptcy Code § 106(b) and (c), the theory we deemed waived in *Franklin III*. Franklin asserts that Bankruptcy Code § 106 constitutes a complete waiver of sovereign immunity separate and apart from the FTCA's waiver of immunity, and that this waiver permits tort claims against the United States which would otherwise not be permitted under the discretionary function exception of FTCA § 2680(a).

Bankruptcy Code § 106, as amended in 1994, provides a waiver of sovereign immunity when the government files a proof of claim against a debtor in a bankruptcy proceeding. Section 106(b) waives sovereign immunity with respect to counterclaims of the debtor's estate "that arose out of the same transaction or occurrence" as the proof of claim. 11 U.S.C. § 106(b).[4] Section 106(c) waives sovereign immunity

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[4] Section 106(b) states that "[a] governmental unit that has filed a proof of claim in the case is deemed to have waived sovereign immunity with respect to a claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of

with respect to counterclaims of the debtor's estate that did not arise out of the same transaction or occurrence as the proof of claim, but only to the extent that the claims offset the government's claim. *Id.* § 106(c).[5] The government does not dispute that it filed proofs of claim in FSC's bankruptcy proceeding or that the conditions of § 106(b) and (c) are met.

3. *The Bankruptcy Court Dismisses Franklin IV Under the Doctrine of Claim Preclusion*

The bankruptcy court granted the government's motion to dismiss on the basis of res judicata, or claim preclusion. *In re Franklin Sav. Corp.*, 296 B.R. at 523, 531. It ruled that Franklin was relitigating the same claims against the same parties as in *Franklin III*, and that all of the claims in *Franklin IV* had been raised, or could have been raised, in *Franklin III*. *Id.* at 527-28. The bankruptcy court rejected Franklin's argument that it could reassert its claims because the claims in *Franklin III* had not been decided on the merits, but had been dismissed for lack of jurisdiction. *Id.* at 526-27. The court also ruled that Bankruptcy Code § 106's waiver of sovereign immunity did not abrogate the discretionary function exception to the FTCA. *Id.* at 528-29. The district court affirmed, and this appeal followed.

II. ANALYSIS

Franklin argues on appeal that *Franklin III* was dismissed for lack of jurisdiction, rather than on the merits, and, therefore, the doctrine of claim preclusion does not bar the reassertion of its claims. We do not reach this issue, however, because it is clear that all of the claims in *Franklin*

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which the claim of such governmental unit arose."

[5] Section 106(c) states that "[n]otwithstanding any assertion of sovereign immunity by a governmental unit, there shall be offset against a claim or interest of a governmental unit any claim against such governmental unit that is property of the estate."

IV are time-barred. Even if *Franklin III* was dismissed without prejudice, the "dismissal of an earlier suit . . . without prejudice does not authorize a subsequent suit brought outside of the otherwise binding period of limitations." *Stein v. Reynolds Sec., Inc.*, 667 F.2d 33, 34 (11th Cir.1982); *see also Lambert v. United States*, 44 F.3d 296, 298 (5th Cir.1995) (same, applying 28 U.S.C. § 2401(b)).

Moreover, as we explain below, the statute of limitations issue is jurisdictional in this case, and must be decided before the claim preclusion issue.[6] Jurisdictional issues must be addressed first and, if they are resolved against jurisdiction, the case is at an end. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). In contrast, "[r]es judicata is *not* a jurisdictional bar; it is an affirmative defense," and, thus, would not defeat subject matter jurisdiction of this or the district court. *Kenmen Eng'g v. City of Union*, 314 F.3d 468, 479 (10th Cir.2002).

A. *The FTCA and Its Time Limitations Govern Franklin's Claims*

1. *The Exclusive Avenue for Franklin's Claim is the FTCA*

We must begin our analysis by making clear what Franklin does not acknowledge: its claims are governed by the FTCA, which provides the exclusive avenue to assert a claim

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[6] "[T]his court is under a continuing obligation to examine both its own jurisdiction and the jurisdiction of the district court. . . ." *Local 514 Transport Workers Union of Am. v. Keating*, 358 F.3d 743, 749 n. 6 (10th Cir.2004). "The determination of the district court's subject matter jurisdiction is a question of law. . . ." *Salt Lake Tribune Publ'g Co., LLC v. AT & T Corp.*, 320 F.3d 1081, 1095 (10th Cir.2003). Therefore, we may affirm the district court's dismissal order if we independently determine that the district court lacked subject matter jurisdiction. *See United States v. Sandoval*, 29 F.3d 537, 542 n. 6 (10th Cir.1994) (noting that this court is "free to affirm a district court decision on any grounds for which there is a record sufficient to permit conclusions of law") (quotation omitted).

sounding in tort against the United States. 28 U.S.C.A. § 2679(a) (providing that the FTCA remedy is "exclusive" for all "claims which are cognizable under section 1346(b)"). Franklin seems to argue that it is bringing its claims under Bankruptcy Code § 106. By its express terms, however, Bankruptcy Code § 106 does not provide a substantive or independent basis for asserting a claim against the government. Section 106(a)(5) states: "Nothing in this section shall create any substantive claim for relief or cause of action not otherwise existing under this title, the Federal Rules of Bankruptcy Procedure, or nonbankruptcy law." Thus, a plaintiff such as Franklin seeking to use the waiver in § 106 must demonstrate that a source outside of § 106 entitles it to the relief sought. *Hardy v. United States (In re Hardy)*, 97 F.3d 1384, 1388 (11th Cir.1996); *see also Zayler v. United States*, 279 F.Supp.2d 805, 814 (E.D.Tex.2003), *appeal pending*, No. 03-41345 (5th Cir.) ("[E]ven though §§ 106(b) and (c) waive sovereign immunity for counterclaims against the United States, any substantive rights asserted must have an independent legal basis.").

That outside source is the FTCA when, as here, the claim sounds in tort. It is clear that the FTCA provides the exclusive avenue to bring a tort claim against the United States, notwithstanding other statutes that permit the government to be sued; a rule previously explained to Franklin in *Franklin III*, 180 F.3d at 1142-43 (holding that the FTCA provides the exclusive avenue for Franklin's tort claims, which are cognizable under FTCA § 1346, notwithstanding the existence of an independent "sue and be sued" limited waiver of immunity). Although Franklin never acknowledges that the FTCA governs its claims in *Franklin IV*, it does admit that all of its claims sound in tort, that it is simply reasserting the same tort claims it asserted in *Franklin III*, and that its claims in *Franklin III* were brought under the FTCA. *See* Aplt. Opening Br. at 5-6, 10; Aplt.App. at 178. Quite clearly then,

the FTCA provides the exclusive avenue for pursuing those claims against the United States.

2. *Time Limitation in Section 2401(b)*

Federal law bars any tort claim against the United States unless it is presented to the appropriate federal agency within two years of the claim's accrual, and filed within six months after notice of denial of the claim by that agency. 28 U.S.C. § 2401(b) ("a tort claim against the United States shall be forever barred unless . . . action is begun within six months after the date of mailing . . . of notice of final denial of the claim by the [appropriate Federal] agency to which it was presented."). Section 2401(b) is the limitations period of the FTCA. *Plaza Speedway Inc. v. United States*, 311 F.3d 1262, 1266 (10th Cir.2002). Here, the relevant federal agency denied the claims asserted in *Franklin IV* on August 10, 1992, eight years before the *Franklin IV* complaint was filed. Aplt.App. at 7, 38.

3. *The FTCA's Timeliness Requirement is Jurisdictional*

Timeliness of suit is one of the conditions of the government's waiver of sovereign immunity under the FTCA, and the district court lacks subject matter jurisdiction to proceed under the FTCA if a plaintiff fails to satisfy the FTCA's timing requirements set forth in § 2401(b). *Dahl v. United States*, 319 F.3d 1226, 1228 (10th Cir.2003).

> The doctrine of sovereign immunity precludes suit against the United States without the consent of Congress; the terms of its consent define the extent of the court's jurisdiction. The applicable statute of limitations is a term of consent. The plaintiff's failure to sue within the period of limitations is not simply a waivable defense; it deprives the court of jurisdiction to entertain the action.

Sisseton-Wahpeton Sioux Tribe v. United States, 895 F.2d 588, 592 (9th Cir.1990).

B. *Franklin Argues Section 2401(b) Does Not Apply*

Franklin does not dispute that the statute of limitations in § 2401 expired prior to its commencement of *Franklin IV*. Rather, it argues that § 2401(b) does not apply. Aplt. Reply Br. at 16. First, it argues that a Kansas saving statute permits it to refile its otherwise untimely claims. Aplt. Opening Br. at 29-32; Aplt.App. at 178. Second, it argues that its use of Bankruptcy Code § 106's waiver of sovereign immunity abrogates any conditions on the waiver found in the FTCA, including the statute of limitations provided in § 2401(b). We find no merit in either proposition.

1. *The Kansas Saving Statute*

Franklin contends that *Franklin IV* is not time-barred because it relates back to the filing date of *Franklin III* by virtue of the Kansas saving statute, which allows an action to be refiled within six months if the original action was timely commenced and was dismissed for reasons other than on the merits. Kan. Stat. Ann. § 60-518.[7] Franklin argues on appeal that the bankruptcy court and the district court erred in rejecting application of the Kansas saving statute. These courts rejected application of section 60-518 on the basis that *Franklin III* had been dismissed for failure to state a claim under Rule 12(b)(6) and, therefore, had failed on the merits. We agree that the Kansas saving statute has no application here, but for a different reason: As noted above, the FTCA is the exclusive means for Franklin to assert its tort claims against the government, and there is no legal basis for applying a state saving statute under the FTCA.

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[7] Section 60-518 states: "If any action be commenced within due time, and the plaintiff fail in such action otherwise than upon the merits, and the time limited for the same shall have expired, the plaintiff . . . may commence a new action within six (6) months after such failure."

Franklin argues that claims under the FTCA rely on the substance of the forum state's tort law, here Kansas, and therefore, that Kansas' statute of limitations determines the limitation period in federal court. Aplt. Opening Br. at 30; Aplt.App. at 178. This court has previously rejected this very argument. *Pipkin v. United States Postal Serv.*, 951 F.2d 272, 274-75 (10th Cir.1991); *see also Benge v. United States*, 17 F.3d 1286, 1288 (10th Cir.1994). Although state law determines whether there is substantive liability under the FTCA, *see Cannon v. United States*, 338 F.3d 1183, 1192 (10th Cir.2003), federal law defines the applicable limitations period, *Pipkin*, 951 F.2d at 274-75. "[A] court looks to state law to define the time limitation applicable to a federal claim only when Congress has failed to provide a statute of limitations for a federal cause of action," but Congress has expressly stated the applicable limitation period for a tort claim brought against the United States, in § 2401(b), so reference to state law is inappropriate. *Id.* (quotation omitted). In both *Pipkin* and *Benge*, this court held that a state saving statute has no application to tort claims brought against the United States. *Benge*, 17 F.3d at 1288 (Oklahoma saving statute); *Pipkin*, 951 F.2d at 274-75 (same). Thus, the Kansas saving statute does not apply to the claims asserted in *Franklin IV*.

2. *Bankruptcy Code § 106 Does Not Abrogate § 2401(b)'s Timeliness Requirements*

Franklin responds that *Benge* and *Pipkin* are inapplicable because the waiver of sovereign immunity under Bankruptcy Code § 106 supercedes the more limited waiver of immunity under the FTCA. Although a condition of the waiver of immunity under the FTCA is compliance with § 2401(b) timing requirements, *Dahl*, 319 F.3d at 1228, Franklin argues that compliance with § 2401(b) is not a condition of § 106's waiver of immunity. It contends that the mere filing of a proof of claim in bankruptcy court constitutes a complete

abrogation not only of any sovereign immunity defense, but also of any rights associated with the waiver of immunity, including the statute of limitations under § 2401(b). Aplt. Reply Br. at 18-19. Franklin cites the cases of *Anderson v. FDIC*, 918 F.2d 1139 (4th Cir.1990) and *Ashbrook v. Block*, 917 F.2d 918 (6th Cir.1990), for the proposition that none of the limitations on liability contained in § 2401(b) or in the FTCA apply when a plaintiff is proceeding under the waiver of immunity contained in § 106. Aplt. Opening Br. at 35-37; Aplt. Reply Br. at 11-14. For the following reasons, we conclude that the condition of the § 2401(b)'s limitation period must be satisfied, notwithstanding any waiver of immunity under Bankruptcy Code § 106.

a. *Section 106 Is Only a Limited Consent To Be Sued in Bankruptcy Court*

Section 106 allows Franklin to file a counterclaim against the United States in bankruptcy court; it does not permit Franklin to file an untimely counterclaim. Section 106 is simply a waiver of sovereign immunity; it does not create a claim for relief, nor does it provide a separate basis for subject matter jurisdiction. *Cf. Weeks Constr., Inc. v. Oglala Sioux Hous. Auth.*, 797 F.2d 668, 671-72 (8th Cir.1986) (holding that the sovereign's consent to be sued, standing alone, does not confer subject matter jurisdiction upon a court to hear a claim against the sovereign).

> In order for a claim against the United States to be heard, first there must be, because sovereign immunity requires it, consent to be sued; and because, with the exception of the Supreme Court, the subject matter jurisdiction of federal courts is defined by statute, there must be, second, Congressional provision of a court with the authority to hear the claim and grant relief.

Quality Tooling, Inc. v. United States, 47 F.3d 1569, 1575 (Fed.Cir.1995).

The court's subject matter jurisdiction for the claims asserted in *Franklin IV* is determined and defined by the provisions of the FTCA. Federal jurisdiction under the FTCA is limited by a number of conditions, including the statute of limitations provision of § 2401(b). As previously noted, the FTCA's waiver of immunity provision, § 1346(b)(1), is subject to the condition of compliance with § 2401(b)'s time limitations. *See Dahl*, 319 F.3d at 1228 (holding that court must dismiss for lack of subject matter jurisdiction if an FTCA litigant does not satisfy the timing requirement of § 2401(b)).

Just as § 2401(b) limits the waiver of sovereign immunity in §§ 1346(b)(1) and 2674, it also limits the waiver in Bankruptcy Code § 106. Section 2401(b)'s two-year limitation applies to *all* tort claims brought against the United States. Franklin presents no persuasive argument why this broadly worded time limitation would not apply simply because the United States has consented to be sued in bankruptcy court pursuant to § 106.

b. *Waivers of Sovereign Immunity and Conditions on that Waiver are Construed Narrowly*

In order for this court to conclude that § 106 abrogates the jurisdictional statute of limitations contained in § 2401(b), we would need to determine that Congress unequivocally expressed such a result. "[T]he United States, as sovereign, is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *Lehman v. Nakshian*, 453 U.S. 156, 160, 101 S.Ct. 2698, 69 L.Ed.2d 548 (1981) (quotations omitted; alteration in original). "Waivers of the Government's sovereign immunity, to be effective, must be unequivocally expressed." *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 33, 112 S.Ct. 1011, 117 L.Ed.2d 181 (1992) (quotations omitted).

"Like a waiver of immunity itself, which must be unequivocally expressed[,] [the Supreme] Court has long decided that limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." *Lehman*, 453 U.S. at 160-61, 101 S.Ct. 2698 (quotations and citations omitted). Thus, in interpreting § 2401(b)'s statute of limitations provision, the Court has stated:

> Section 2401(b) . . . is the balance struck by Congress in the context of tort claims against the Government; and we are not free to construe it so as to defeat its obvious purpose, which is to encourage the prompt presentation of claims. We should regard the plea of limitations as a meritorious defense, in itself serving a public interest.
>
> We should also have in mind that the [FTCA] waives the immunity of the United States and that in construing the statute of limitations, which is a condition of that waiver, we should not take it upon ourselves to extend the waiver beyond that which Congress intended.

United States v. Kubrick, 444 U.S. 111, 117, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979) (quotations and citations omitted).

Neither the language nor the legislative history of Bankruptcy Code § 106 "unequivocally express" a congressional intent to abrogate, eliminate, or avoid any applicable statute of limitations that is integral to the cause of action asserted pursuant to § 106's waiver. Section 106 requires a plaintiff seeking to use its waiver to demonstrate that a source outside of § 106 entitles it to the relief sought, and does not evidence any intent to exempt the plaintiff from satisfying any time-bar condition or requirement contained within that outside source. The legislative history of § 106, as evidenced by both the Senate and House Committee reports, confirms that Congress intended § 106 to provide a limited waiver of sovereign immunity to enable a debtor to recover damages only to the

same extent that the debtor's claims would be cognizable outside of bankruptcy:

> Section 106 provides for a limited waiver of sovereign immunity in bankruptcy cases. Though Congress has the power to waive sovereign immunity for the Federal government completely in bankruptcy cases, the policy followed here is designed to achieve approximately *the same result* that would prevail outside of bankruptcy. . . .
>
> . . . .
>
> This section does not confer sovereign immunity on any governmental unit that does not already have immunity. It simply recognizes any immunity that exists and prescribes the proper treatment of claims by and against that sovereign.

S. REP. No. 95-989, 95th Cong., 2d Sess. at 29-30 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5815-16; H.R. REP. No. 95-595, 95th Cong., 1st Sess. at 317 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 6274 (emphasis added).

c. *Anderson and Ashbrook*

In *Anderson v. FDIC*, and *Ashbrook v. Block*, the Fourth and Sixth Circuit, respectively, held that, under Bankruptcy Code § 106, the government waives the administrative exhaustion requirement in § 2675(a) of the FTCA by simply filing a proof of claim. *Anderson*, 918 F.2d at 1143-44; *Ashbrook*, 917 F.2d at 922-23. Bankruptcy Code § 106 "is based on equity[;] in essence, it would be unfair for a governmental unit to participate in the distributions of a bankruptcy case while at the same time shielding itself from liability." *Zayler*, 279 F.Supp.2d at 811. The *Anderson* and *Ashbrook* courts concluded it would be inequitable to allow the government to file a proof of claim and receive a distribution from a debtor's estate, while requiring the debtor to pursue administrative remedies in order to pursue a

counterclaim against the government. Franklin urges us to follow these decisions and conclude that the government also waives § 2401(b)'s statute of limitations when it files a proof of claim.

We express no opinion as to the merits of *Anderson* and *Ashbrook* with respect to their conclusion that § 106 avoids § 2675(a)'s administrative exhaustion requirement. We find, however, no similar policy or other reason of equity to support a conclusion that Congress intended § 106's waiver to eliminate the government's right to demand compliance with the statute of limitations condition contained in § 2401(b). There are fundamental differences between eliminating a requirement that a claim be first presented to an administrative agency, which is based on principles of judicial efficiency, and eliminating a requirement that a claim be filed in a timely manner:

> Statutes of limitations, which are found and approved in all systems of enlightened jurisprudence, represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

Kubrick, 444 U.S. at 117, 100 S.Ct. 352 (quotations and citation omitted).

It would be extraordinarily unfair to the United States if the mere filing of a proof of claim in a bankruptcy proceeding subjected it to liability for untimely claims, leaving it without recourse to the usual protections from stale claims available to it in any other, non-bankruptcy proceeding. To state such a proposition is to reject it. Moreover, the *Anderson* and *Ashbrook* decisions were decided before the 1994 amendment to § 106, which added the explicit statement in subsection 106(a)(5), that § 106 did not create any substantive claim for

relief or cause of action, and that any substantive rights asserted thereunder must have an independent legal basis.

In summary, even though Franklin may avail itself of the waiver of immunity in Bankruptcy Code § 106, the FTCA remains the exclusive means by which Franklin may assert its tort claims, with the FTCA's attendant statute of limitations condition contained in § 2401(b). Congress did not unequivocally manifest an intent in Bankruptcy Code § 106 to displace § 2401. Absent such an unequivocal expression of intent, this court is not at liberty to construe § 106's waiver or § 2401(b)'s statute of limitations "beyond that which Congress intended" or to construe the limitations requirement of § 2401(b) "so as to defeat its obvious purpose, which is to encourage the prompt presentation of claims." *Kubrick*, 444 U.S. at 117-18, 100 S.Ct. 352. The government has not consented to be sued once the time period prescribed by § 2401(b) has run. Because Franklin's claim is untimely under § 2401(b), this court lacks subject matter jurisdiction.

The judgment of the district court is AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 03-2040-JWL

FRANKLIN SAVINGS CORP. and
FRANKLIN SAVINGS ASSOC.,
Plaintiffs/Appellants,

v.

UNITED STATES OF AMERICA and the
FEDERAL DEPOSIT INSURANCE CORP.,
Defendant/Appellees.

MEMORANDUM & ORDER

This action arises out of the government's decision to seize and eventually liquidate a state-chartered savings and loan (S&L) institution during the S&L crisis of the late 1980's. Plaintiffs Franklin Savings Association ("FSA") (now a defunct savings and loan institution) and Franklin Savings Corporation ("FSC") (the record holder of approximately 94% of the issued and outstanding shares of FSA stock) have filed at least five different lawsuits against the government, each relating to the conservation and liquidation of FSA. All of the lawsuits have been dismissed.

The matter comes before this court on FSA and FSC's (collectively referred to as "Franklin Savings") appeal of the bankruptcy court's November 22, 2002, Memorandum and Order ("M&O") granting the United States and Federal Deposit Insurance Corporation's motion to dismiss, *In re Franklin Sav. Ass'n*, _ B.R. _, 2002 WL 32130285 (Bankr. D.

Kan. Nov. 22, 2002), and the bankruptcy court's January 21, 2003, M&O denying Franklin Savings' motion to reconsider the November 22, 2002, M&O. Because the court agrees with the bankruptcy court's conclusion that Franklin Savings' claims should be dismissed on the basis of claim preclusion, this court affirms the orders of the bankruptcy court.

BACKGROUND

Because the facts relating to this action are not disputed by the parties, this court will not thoroughly recite the litany of facts giving rise to this action.[1] Instead, the court will merely restate the bankruptcy court's account of the facts relevant to the issues here.

In 1990, the Director of the Office of Thrift Supervision ("OTS") determined that FSA was "in an unsafe and unsound condition to transact business" and appointed the Resolution Trust Corporation ("RTC") as its conservator. Shortly thereafter, Franklin Savings filed an action under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 to remove the conservator. After the district court held the appointment of the conservator was arbitrary and capricious, the Tenth Circuit reversed, reasoning that review of the decision to appoint a conservator is limited to the administrative record and that the record supported the RTC's decision to

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[1] A detailed history of the Franklin Savings litigation involving the conservation and liquidation of FSA is set out in many of the eight or more opinions relating to this issue. *Franklin Sav. Ass'n v. United States*, 56 Fed. Cl. 720 (Fed. Cl. June 16, 2003); *In re Franklin Savings Ass'n*, _B.R._, 2002 WL 32130285 (Bankr. D. Kan. Nov. 22, 2002); *Franklin Sav. Ass'n v. Office of Thrift Supervision*, 742 F. Supp. 1089 (D. Kan. 1990), *rev'd and vacated* 934 F.2d 1127 (10th Cir. 1991), *cert. denied* 503 U.S. 937 (1992) *(Franklin I); Franklin Sav. Ass'n v. Office of Thrift Supervision*, 821 F. Supp. 1414 (D. Kan. 1993), *affirmed* 35 F.3d 1466 (10th Cir. 1994), *cert. denied* 528 U.S. 964 (1999) *(Franklin II); Franklin Sav. Ass'n v. United States*, 970 F. Supp. 855 (D. Kan. 1997), *affirmed* 180 F.3d 1124 (10th Cir. 1999), *cert. denied* 528 U.S. 964 *(Franklin III).*

appoint a conservator. *Franklin I*, 742 F. Supp. at 1126, *rev'd*, 934 F.2d at 1149.

In 1992, after the first action was dismissed, the OTS switched the RTC's function from conservator to receiver. Franklin Savings again sued. The Tenth Circuit affirmed the district court's dismissal of the action, holding that the decision to appoint a receiver is not subject to judicial review. *Franklin II*, 821 F. Supp. at 1418-24, *aff'd*, 35 F.3d at 1469-71.

Undeterred by its prior shortfalls, Franklin Savings filed yet another lawsuit in 1993, this time against RTC in bankruptcy court. *Franklin III*, 970 F. Supp. at 860. The complaint sought damages from RTC under the Federal Tort Claims Act ("FTCA"). After the district court withdrew the action from the bankruptcy court, Franklin Savings amended the complaint to substitute RTC's successor-in-interest, Federal Deposit Insurance Corporation ("FDIC"), as a defendant, along with the United States. *Id.*

The first cause of action in the complaint alleged that RTC violated numerous mandatory procedures set out in its regulatory manuals and policy directives. It also alleged that RTC was negligent and breached its fiduciary duty "in failing to carry on the business of FSA, in failing to act to protect the assets and economic viability of FSA, and in violating specific mandatory rules and regulations." The second cause of action alleged that RTC engaged in "non-governmental activities in commerce" and therefore stopped exercising the kind of discretion protected by the FTCA. The third cause of action, brought under the APA, alleged that RTC exceeded its statutory authority by seizing control of FSA and acting as its conservator. Franklin Savings also asserted common-law tort claims against FDIC in that action.

The government moved to dismiss all of the claims in *Franklin III* for lack of subject matter jurisdiction. The dis-

trict court granted the government's motion, and the Tenth Circuit affirmed the dismissal of all claims for lack of subject matter jurisdiction. *Franklin III*, 970 F. Supp. at 860, *aff'd*, 180 F.3d at 1129. The Supreme Court subsequently denied Franklin Savings' petition for writ of certiorari. *Franklin III*, 528 U.S. at 964.

Franklin Savings then filed this action in bankruptcy court. As the bankruptcy court noted, the parties, allegations, and legal claims are nearly identical to those in *Franklin III*. Specifically, the same plaintiffs have filed this action—FSA and FSC—against the same defendants—the United States and FDIC as the successor-in-interest to RTC. The factual allegations are taken virtually verbatim from the second amended complaint in *Franklin III*. Each of the causes of action the district court dismissed in *Franklin III* are restated in the current complaint (Counts I-III), and Franklin Savings has broken out the allegations of negligence and breach of fiduciary duty that were contained within the first cause of action (Count I) of *Franklin III* into two new causes of action here (Counts IV and V). In the sixth cause of action (Count VI), Franklin Savings alleges a violation of K.S.A. § 17-5812. As in *Franklin III*, Franklin Savings seeks money damages of $820 million.

The major difference in this action is that Franklin Savings asserts a new jurisdictional basis. In *Franklin III*, Franklin Savings asserted that jurisdiction arose under 28 U.S.C. § 1346(b) (because the claims arose under the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.*) and the Administrative Procedure Act, 5 U.S.C. § 701 *et. seq.* In this action, by contrast, Franklin Savings relies solely on 11 U.S.C. § 106 for subject matter jurisdiction and argues that the statutory section provides an independent waiver of sovereign immunity with respect to its claims.

Believing the current complaint to be a rehash of the prior lawsuit and therefore a second bite at the apple, the United

States and FDIC filed a motion to dismiss Franklin Savings' complaint under the claim preclusion doctrine and because the statute of limitations had run. The bankruptcy court granted the motion on the basis of claim preclusion. Franklin Savings then appealed to this court.

STANDARD OF REVIEW

In reviewing a bankruptcy court's decision, a district court reviews legal conclusions de novo. *In re Foster*, 188 F.3d 1259, 1264 (10th Cir. 1999). The parties agree the de novo standard of review is appropriate here.

DISCUSSION

The bankruptcy court dismissed Franklin Savings' claims on the grounds that the doctrine of res judicata barred Franklin Savings' attempt to relitigate the same issues decided in *Franklin III*. "Under res judicata, or claim preclusion, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or *could have been raised in* the prior action." *Wilkes v. Wyoming Dep't of Employment Division of Labor Standards*, 314 F.3d 501, 503-04 (10th Cir. 2003)(emphasis in original) (quoting *Satsky v. Paramount Comm., Inc.*, 7 F.3d 1464, 1467 (10th Cir. 1993)). "To apply the doctrine of [claim preclusion], three elements must exist: (1) a [final] judgment on the merits in an earlier action; (2) identity of parties or privies in the two suits; and (3) identity of the cause of action in both suits." *Id.* (quoting *King v. Union Oil Co.*, 117 F.3d 443, 445 (10th Cir. 1997)).

The bankruptcy court compared the claims in the present action to those raised in the second amended complaint in *Franklin III* and concluded that all three prongs of the claim preclusion test were satisfied. First, the bankruptcy court looked at the district court and Tenth Circuit's language in *Franklin III* and concluded that the action ended with a

judgment on the merits. The bankruptcy court pinpointed the district court's statement in *Franklin III* that it must "convert a Rule 12(b)(l) motion to dismiss into a Rule 12(b)(6) motion or a Rule 56 summary judgment motion when resolution of the jurisdictional question is intertwined with the merits of the case." *In re Franklin Savings Ass'n*, 2002 WL 32130285, at *3 (Bankr. D. Kan. Nov. 22, 2002)(quoting *Franklin III*, 970 F. Supp. at 860) (quoting *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995)). It then explained that the district court applied this principle in the action and concluded that the decision was fully on the merits. *Id.* The bankruptcy court also analyzed the Tenth Circuit's opinion in *Franklin III* and concluded that the court considered and upheld the district court's analysis. The bankruptcy court noted that the Tenth Circuit was cognizant that the government had moved to dismiss under both Rules 12(b)(1) and 12(b)(6) but nonetheless agreed with the district court that a motion to dismiss for lack of subject matter jurisdiction must be converted into a motion to dismiss for failure to state a claim or for summary judgment "if the jurisdiction question is intertwined with the merits of the case." *Id.* (quoting *Franklin III*, 180 F.3d at 1129 (quoting *Bell v. United States*, 127 F.3d 1226, 1228 (10th Cir. 1997)). The court also observed that the Tenth Circuit explicitly stated that the issue of whether the FTCA's discretionary function exception applies is "such a [merits-based] question." *Id.* Thus, the bankruptcy court concluded that the Tenth Circuit decided *Franklin III* under Rule 12(b)(6) and that such a decision is a judgment on the merits that satisfies the first prong of the claim preclusion test. *Id.*

After determining that the Tenth Circuit's decision in *Franklin III* was a decision on the merits, the bankruptcy court turned to the second and third prongs of the claim preclusion test. It quickly concluded that the second prong of the test—identity of parties—was met since it was uncontested that Franklin Savings was again suing the United States

and FDIC. *Id.* at 4. It also concluded that the third prong—identity of causes of action—was met because the claims in the pending complaint were identical to or derived from the claims in *Franklin III*. *Id.* In particular, the court noted that the first three claims of the pending complaint were identical; in fact, the allegations were taken word for word from the complaint in *Franklin III*. Additionally, the two new claims presented to the bankruptcy court, although not identical to those previously relied upon, were merely derived from the first claim in *Franklin III*. *Id.* Thus, the bankruptcy court concluded that all three prongs of the claim preclusion test were satisfied and therefore Franklin Savings' complaint was dismissed. *Id.*

The bankruptcy court also explained that Franklin Savings cannot avoid the substantive requirements of the FTCA by availing itself of the separate waiver of sovereign immunity contained in 11 U.S.C. § 106 of the bankruptcy code. *Id.* at 6-7. Although the court acknowledged that § 106 does contain a waiver of sovereign immunity for compulsory counterclaims against the United States when the government has filed a proof of claim on the debtor's assets in bankruptcy, it concluded that Franklin Savings' use of that section as an alternative route to recovery in this case would be contrary to Congress' intent that the FTCA be the exclusive avenue for tort actions against the United States. *Id.*

Franklin Savings now argues that the bankruptcy court's decision was erroneous in four major respects: (1) the court erred in holding that *Franklin III* ended with a judgment on the merits; (2) the court erred in applying the claim preclusion doctrine to bar its claims in this action since it did not have a full and fair opportunity to litigate; (3) because *Franklin III* did not end with a judgment on the merits, the bankruptcy court erred in not applying the Kansas Savings statute and concluding that Franklin Savings' claims were filed within the statute of limitations period; and (4) the court erred in not

holding that § 106 waives sovereign immunity and establishes jurisdiction to bring the tort claims.

Franklin Savings' theory, then, is that its claims in this action are tort law claims actionable under Kansas state law, and § 106(b) of the bankruptcy code provides a waiver of sovereign immunity (for compulsory counterclaims against a governmental unit when that unit has filed a proof of claim on the debtor's assets in bankruptcy) that is separate and independent of the FTCA. Thus, because it complied with the requirements of § 106, it may bring its claims here without implicating the FTCA. Moreover, according to Franklin Savings, claim preclusion should not apply to bar its claims here. It reasons that *Franklin III* was dismissed because the FTCA's discretionary function exception applied and the discretionary function exception is a jurisdictional issue. Thus, because the district court and Tenth Circuit concluded that they did not have jurisdiction over the claims, they could not have addressed the merits of the claims. As a result, *Franklin III* could not have been decided on the merits and claim preclusion therefore does not apply.

A. Decision on the Merits

Because the court agrees with the bankruptcy court that *Franklin III* was a decision on the merits, Franklin Savings' claims are barred by the doctrine of claim preclusion. Franklin Savings argues that *Franklin III* could not have been decided on the merits because the discretionary function exception is a jurisdictional issue and since the court concluded that the exception applied, it did not have jurisdiction to decide the merits of the case. Franklin Savings' argument, however, is undercut by the Tenth Circuit's decisions regarding jurisdictional issues that are intertwined with the merits of the case.

It is established law in the Tenth Circuit that "a court is required to convert a Rule 12(b)(1) motion to dismiss into a

Rule 12(b)(6) motion or a Rule 56 summary judgment motion when resolution of the jurisdictional question is intertwined with the merits of the case." *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995); *see also Franklin III*, 180 F.3d at 1129; *Tippett v. United States*, 108 F.3d 1194, 1196 (10th Cir. 1997); *Bell v. United States*, 127 F.3d 1226, 1228 (10th Cir. 1997)(quoting *Wheeler v. Hurdman*, 825 F.2d 257, 259 (10th Cir. 1987)). The Tenth Circuit has stated numerous times that "[w]hether the discretionary function exception [to the FICA] applies is such a question." *Franklin III*, 180 F.3d at 1129; *see also Pringle v. United States*, 208 F.3d 1220, 1223 (10th Cir. 2000); *Bell*, 127 F.3d at 1228; *Tippett*, 108 F.3d at 1196; *Redmond v. United States*, 934 F.2d 1151, 1155 (10th Cir. 1991).

In *Pringle*, the Tenth Circuit expounded on the reasoning behind this rule. 208 F.3d at 1223. It explained that the focus is not limited to whether the jurisdictional issue arises from the same statute that provides the substantive claim; rather, "the underlying issue is whether resolution of the jurisdictional question requires resolution of an aspect of the substantive claim." *Id.* (citing *Wheeler*, 825 F.2d at 259; 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1350, at 235 (1990)). In other words, if the court must address a substantive component of a claim in deciding the issue of jurisdiction, then the court must analyze the issue under Rule 12(b)(6).

Applying the Tenth Circuit's reasoning in *Pringle* clearly shows that the district court and Tenth Circuit's decisions in *Franklin III* constitute a decision on the merits. The Tenth Circuit's proclamation that whether the discretionary function exception applies is jurisdictional issue intertwined with the merits of the case indicates that the Tenth Circuit has interpreted the discretionary function exception to be a substantive component of the FTCA, as well as a jurisdictional prerequisite. Thus, in deciding that they lacked subject matter juris-

diction over the claims in *Franklin III*, the district court and Tenth Circuit also concluded that Franklin Savings could not meet a substantive requirement of the FTCA (pleading facts from which it could be inferred that its claims did not fall within the discretionary function exception). Because they addressed a substantive aspect of the claim in resolving the jurisdictional issue, the district court and Tenth Circuit treated the government's motion as a motion to dismiss under Rule 12(b)(6), and a dismissal under that rule is a judgment on the merits. *See, e.g., Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 399 n.3 (1981)(stating that a dismissal under Rule 12(b)(6) is a judgment on the merits). As a result, the bankruptcy court correctly concluded that the Tenth Circuit's holding in *Franklin III* that Franklin Savings' claims fall within the discretionary function exception was a decision on the merits.[2]

B. Full and Fair Opportunity to Litigate

Franklin Savings alternatively argues that the claim preclusion doctrine should not bar its claims because it did not receive "a full and fair opportunity to litigate." While the United States Supreme Court and some Tenth Circuit cases have made reference to "a full and fair opportunity to litigate" as a fourth element of the claim preclusion test, the bankruptcy court correctly noted that the Tenth Circuit has construed this requirement as an exception to the application of claim preclusion when the three prongs of the test are otherwise satisfied. *Yapp v. Excel Corp.*, 186 F.3d 1222,

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[2] Because the court concludes that *Franklin III* was a decision on the merits, it is equally clear that the Kansas Savings Statute has no application to the facts here. As the bankruptcy court pointed out in denying Franklin Savings' motion to reconsider, the plain language of the statute states that it applies to prevent the forfeiture of a cause of action when the prior litigation containing the cause of action fails on some basis other than the merits. However, the court need not address the statute of limitations argument because the claim preclusion doctrine bars the claims.

1226-27 n.4 (10th Cir. 1998). Thus, this court must determine whether Franklin Savings had "a full and fair opportunity to litigate" its claims. The court concludes that it did.

Although Franklin Savings points out that *Franklin III* was decided without an evidentiary hearing and with the district court considering only its complaint in rendering its decision, Franklin Savings does not explain how that necessarily means that it did not receive a full and fair opportunity to litigate. The district court and Tenth Circuit both considered the claims in Franklin Savings' complaint and concluded that they failed to a state a claim upon which relief can be granted. Thus, Franklin Savings was not allowed to put on evidence or afforded a trial because the courts concluded that it failed to state a claim. As a result, Franklin Savings was clearly afforded a full and fair opportunity to litigate.

Having determined that the district court and Tenth Circuit's decisions in *Franklin III* constitute decisions on the merits and that Franklin Savings had a full and fair opportunity to litigate, the court agrees with the bankruptcy court that Franklin Savings' claims are barred on claim preclusion grounds.

C. 11 U.S.C. § 106

The bankruptcy court also rejected Franklin Savings' position that it can avoid the claim preclusion bar by relying on a separate waiver of sovereign immunity under 11 U.S.C. § 106. This court interprets the bankruptcy court's decision as stating that Franklin Savings cannot state a claim apart from the FTCA. Although this court believes that the claim preclusion bar would apply even if Franklin Savings could avoid the FTCA, the court agrees with the bankruptcy court that Franklin Savings' claims must be characterized as FTCA claims subject to the discretionary function exception.

Franklin Savings attempts to evade the claim preclusion bar by characterizing its current claims as tort law claims

cognizable under Kansas state law. It argues that it may bring such claims against the United States in bankruptcy court because § 106 of the bankruptcy code constitutes a separate and independent waiver of sovereign immunity, apart from the FTCA. Assuming Franklin Savings meets the requirements of § 106(b), however, that section merely provides a waiver of sovereign immunity; Franklin Savings must still point to a source of law for its causes of action. *In re Franklin Savings Ass'n*, 2002 WL 32130285, at *6 (Bankr. D. Kan. Nov. 22, 2002) (noting that § 106(a)(5) provides that the section does not create any substantive cause of action that did not otherwise exist); *Hardy v. United States*, 97 F.3d 1384, 1388 (11th Cir. 1996)(noting that § 106 does not create a cause of action).

Although Franklin Savings argues that its claims are cognizable under Kansas state tort law, permitting the claims to be brought apart from the FTCA would contravene Congress' intent. Congress stated in the FTCA that the act is the exclusive remedy for tort claims against the United States. 28 U.S.C. § 2679; *Franklin III*, 180 F.3d at 1142 ("Thus, if a suit is 'cognizable' under [28 U.S.C.] § 1346(b) of the FTCA, the FTCA remedy is 'exclusive . . . .'")(quoting *FDIC v. Meyer*, 510 U.S. 471, 476 (1994)). Because Franklin Savings' claims sound in tort, they must therefore comport with the substantive requirements of the FTCA. As this court explained above, the discretionary function exception is a substantive requirement of the FTCA. Thus, Franklin Savings cannot avoid the discretionary function exception of the FTCA merely by relying on the waiver of sovereign immunity contained in § 106(b).

In short, then, Franklin Savings' attempt to circumvent the district court and Tenth Circuit's decisions in *Franklin III* by bringing its claim in bankruptcy court and relying on a different jurisdictional basis is contrary to the doctrine of claim preclusion. The discretionary function exception is a

substantive requirement of the FTCA; therefore, *Franklin III* was a decision on the merits. Franklin Savings is therefore barred from bringing these tort claims against the same defendants regardless of whether they are brought in bankruptcy court. As such, this court affirms the bankruptcy court's ruling.

IT IS THEREFORE ORDERED BY THE COURT THAT the bankruptcy court's orders are affirmed.

IT IS SO ORDERED this 30th day of July, 2003.

/s/ John W. Lungstrum
John W. Lungstrum
United States District Judge

APPENDIX C

UNITED STATES BANKRUPTCY COURT
D. KANSAS

Bankruptcy No. 91-41518-11
Adversary No. 00-6029

In re FRANKLIN SAVINGS CORPORATION,
Debtor,

FRANKLIN SAVINGS CORPORATION and
FRANKLIN SAVINGS ASSOCIATION,
Plaintiffs,

v.

UNITED STATES OF AMERICA and the FEDERAL DEPOSIT INSURANCE CORPORATION, as successor in interest to the Resolution Trust Corporation,
Defendants.

Nov. 22, 2002

MEMORANDUM AND ORDER [1]

JOHN T. FLANNAGAN, Bankruptcy Judge.

In 1993, Franklin Savings Corporation ("FSC") and Franklin Savings Association ("FSA") filed an adversary complaint against the Resolution Trust Corporation ("RTC"), alleging that the RTC violated mandatory procedures, acted with

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[1] Plaintiffs appear by their attorneys, R. Pete Smith and Jonathan A. Margolies of McDowell, Rice, Smith & Gaar, Kansas City, Missouri. Defendants appear by their attorneys, Jeffrey L. Karlin, Trial Attorney, Torts Branch, Civil Division, U.S. Dept. of Justice; Jeffrey Axelrad, Director, Torts Branch; Jackie N. Williams, United States Attorney; and David W. Ogden, Acting Assistant Attorney General.

negligence and breached its fiduciary duty, engaged in "non-governmental activity in commerce," and exceeded its statutory authority under the Administrative Procedure Act. In 1997, the district court dismissed all claims for lack of subject matter jurisdiction. Plaintiffs now have filed another adversary complaint, alleging identical counts and adding three others, but asserting a new jurisdictional basis under 11 U.S.C. § 106. Defendants have filed a motion to dismiss plaintiffs' complaint, and this court sustains defendants' motion on the basis of res judicata.

I. *Procedural and Factual Background*

The court need not provide an exhaustive recounting of the facts culminating in this lawsuit. The history of the Franklin Savings litigation involving the conservation and liquidation of Franklin Savings Association is detailed in several prior decisions.[2] This court has culled the following summary of the litigation from *Franklin Savings Corp. v. United States*,[3] which this court paraphrases as follows:

A. Past Litigation

In 1990, the Director of the Office of Thrift Supervision ("OTS") determined that FSA was "in an unsafe and unsound condition to transact business" and appointed the RTC as its conservator. FSA and its parent, FSC, filed suit under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 to remove the conservator. While the district

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[2] *See Franklin Sav. Ass'n v. Office of Thrift Supervision*, 742 F.Supp. 1089 (D.Kan.1990), *rev'd*, 934 F.2d 1127 (10th Cir.1991) [*Franklin I*], *cert. denied*, 503 U.S. 937, 112 S.Ct. 1475, 117 L.Ed.2d 619 (1992); *Franklin Sav. Ass'n v. Office of Thrift Supervision*, 821 F.Supp. 1414 (D.Kan.1993), *aff'd*, 35 F.3d 1466 (10th Cir.1994) [*Franklin II*]; *Franklin Sav. Corp. v. United States*, 970 F.Supp. 855 (D.Kan.1997), *aff'd* 180 F.3d 1124 (10th Cir.1999) [*Franklin III*], *cert. denied*, 528 U.S. 964, 120 S.Ct. 398, 145 L.Ed.2d 310 (1999).

[3] 180 F.3d 1124, 1127 (10th Cir.1999).

court held the appointment arbitrary and capricious, the Tenth Circuit reversed, holding that review of the decision to appoint a conservator is limited to the administrative record and that the record supported the decision.[4]

In 1992, after the first suit had been dismissed, the OTS changed the RTC's role from conservator to receiver.[5] FSA and FSC again sued. In 1994, the Tenth Circuit affirmed the dismissal of that suit on the ground that the decision to appoint a receiver is not subject to judicial review.[6]

Meanwhile, in 1993, plaintiffs filed an adversary complaint against the RTC in bankruptcy court.[7] That complaint sought damages under the Federal Tort Claims Act ("FTCA") based on the RTC's acts as conservator.[8] The district court withdrew the reference from the bankruptcy court, and plaintiffs amended their complaint to name the Federal Deposit Insurance Corporation, the RTC's successor-in-interest.[9]

In Count I of that complaint, plaintiffs asserted under the FTCA that the RTC violated numerous mandatory procedures set out in its regulatory manuals and policy directives. In that Count, plaintiffs also alleged negligence and breach of fiduciary duty by the RTC "in failing to carry on the business of FSA, in failing to act to protect the assets and economic viability of FSA, and in violating specific mandatory rules and regulations."

In Count II, plaintiffs alleged that the RTC engaged in "non-governmental activity in commerce" and consequently

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[4] *See Franklin I*, 742 F.Supp. at 1126, *rev'd*, 934 F.2d at 1149.

[5] *See* 57 Fed.Reg. 41,969 (1992).

[6] *See Franklin II*, 821 F.Supp. at 1418-24, *aff'd*, 35 F.3d at 1469-71.

[7] *See Franklin*, 970 F.Supp. at 860.

[8] *Id.*

[9] *Id.*

ceased to exercise discretion of the sort protected by the FTCA.

In Count III, plaintiffs alleged under the Administrative Procedure Act that the RTC exceeded its statutory authority in seizing control of FSA and in acting as FSA's conservator. Plaintiffs also asserted common-law tort claims against the FDIC.

The government moved to dismiss all claims for lack of subject matter jurisdiction. The district court granted the government's motion, and plaintiffs appealed to the Tenth Circuit. The Tenth Circuit affirmed the dismissal of all claims for lack of subject matter jurisdiction. Plaintiffs' efforts to seek review of these court rulings were rejected by the United States Supreme Court.[10]

B. Present Complaint

Plaintiffs have now filed this adversary complaint, which is virtually identical to their second amended complaint filed in *Franklin III* with respect to the actual parties, allegations, and legal claims. The same plaintiffs have filed suit—FSA and FSC. The same defendants have been named, the United States and the FDIC as successor-in-interest to the RTC. The factual allegations are exactly the same, restated from the second amended complaint in *Franklin III* virtually verbatim. Each of the claims the district court dismissed in the prior action are restated in the instant complaint, also *verbatim* (Counts I-III). Plaintiffs have broken out into two separate counts (Counts IV and V) allegations of negligence and breach of fiduciary duty that were subsumed within Count I of the prior action. In Count VI, plaintiffs allege violation of K.S.A. § 17-5812. As in the prior action, the plaintiffs seek money damages in the amount of $820 million.

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[10] *See Franklin III*, 180 F.3d 1124, 1129 (10th Cir.), *cert. denied*, 528 U.S. 964, 120 S.Ct. 398, 145 L.Ed.2d 310 (1999).

In the matter presently before this court, plaintiffs assert a different jurisdictional basis. In the prior action (*Franklin III*), plaintiffs asserted that jurisdiction arose "under 28 U.S.C. § 1346(b) as this is an action arising under the Federal Tort Claims Act, 28 U.S.C. §§ 2671 *et seq.*"[11] Plaintiffs also asserted the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.*, as a jurisdictional basis. In this present complaint, plaintiffs rely solely on 11 U.S.C. § 106 for subject matter jurisdiction and contend that it provides an independent waiver of sovereign immunity with respect to the claims alleged.

II. *Rule 12(b)(6) Standards*

The court will dismiss a cause of action for failure to state a claim only when it appears beyond a doubt that the plaintiff can prove no set of facts in support of the theory of recovery that would entitle him or her to relief[12] or when an issue of law is dispositive.[13] The court accepts as true all well-pleaded facts, as distinguished from conclusory allegations,[14] and all reasonable inferences from those facts are viewed in favor of the plaintiff.[15] The issue in resolving a motion such as this is not whether the plaintiffs will ultimately prevail, but whether they are entitled to offer evidence to support the claims.[16]

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[11] Second amended complaint filed December 2, 1996, in Case No. 95-2100-GTV, Doc. # 56, at 3.

[12] *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); *Maher v. Durango Metals, Inc.*, 144 F.3d 1302, 1304 (10th Cir.1998).

[13] *Neitzke v. Williams*, 490 U.S. 319, 326, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989).

[14] *Maher*, 144 F.3d at 1304.

[15] *Witt v. Roadway Express*, 136 F.3d 1424, 1428 (10th Cir.), *cert. denied*, 525 U.S. 881, 119 S.Ct. 188, 142 L.Ed.2d 154 (1998).

[16] *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974).

III. *Discussion*

Defendants move for dismissal of plaintiffs' complaint on the basis that plaintiffs' claims are barred by the doctrine of res judicata. Res judicata, or claim preclusion, precludes a party from relitigating issues that were or could have been raised in an earlier action, provided that the earlier action proceeded to a final judgment on the merits.[17] To apply the doctrine of res judicata, three elements must exist: (1) the prior suit must have ended with a judgment on the merits; (2) the parties must be identical or in privity; and (3) there must be an identity of the cause of action in both suits.[18]

The Tenth Circuit has adopted the transactional approach of the *Restatement (Second) of Judgments* in determining what constitutes "identity" of the causes of action.[19] This approach provides that a claim arising out of the same "transaction, or series of connected transactions" as a previous suit, which concluded in a valid and final judgment, will be precluded.[20] What constitutes the same transaction or a

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[17] *Mitchell v. City of Moore*, 218 F.3d 1190, 1202 (10th Cir.2000) (quoting *Clark v. Haas Group, Inc.*, 953 F.2d 1235, 1238 (10th Cir.), *cert. denied*, 506 U.S. 832, 113 S.Ct. 98, 121 L.Ed.2d 58 (1992)).

[18] *Id.* (citing *Yapp v. Excel Corp.*, 186 F.3d 1222, 1226 (10th Cir. 1999)). The Tenth Circuit, on occasion, has made reference to a fourth element—that the plaintiff has had a full and fair opportunity to litigate the claim in the prior suit. *See Nwosun v. General Mills Restaurants, Inc.*, 124 F.3d 1255, 1257 (10th Cir.1997), *cert. denied*, 523 U.S. 1064, 118 S.Ct. 1396, 140 L.Ed.2d 654 (1998). Recently, however, the Circuit has reiterated that the three requirements set forth above are "all that are necessary for a principled application of the doctrine of claim preclusion." *See Yapp*, 186 F.3d at 1226-27 n. 4. Thus, the absence of a full and fair opportunity to litigate should be treated as an exception to the application of claim preclusion when the referenced requirements are otherwise present. *Id.*

[19] *See Mitchell*, 218 F.3d at 1202.

[20] *Id.* (*citing Yapp*, 186 F.3d at 1227 (quoting *Restatement (Second) of Judgments* § 24 (1982))).

series of connected transactions is "to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage."[21]

This court has compared the claims raised in the second amended complaint in *Franklin III* to those claims asserted in the present action and concludes that all three prongs of the claims preclusion analysis have been met. First, the prior suit ended with a judgment on the merits. Plaintiffs attempt to dispute this conclusion by arguing that "the essence of [the trial court's] finding [in *Franklin III*] is a lack of subject matter jurisdiction over the tort claims asserted," and thus, the prior case was not decided on the merits. Plaintiffs, however, concede that the prior action was dismissed on the basis of Rule 12(b)(6) for failure to state a claim. Indeed, the district court in *Franklin III* stated in its ruling that it was "required to convert a Rule 12(b)(1) motion to dismiss into a Rule 12(b)(6) motion or a Rule 56 summary judgment motion when resolution of the jurisdictional question is intertwined with the merits of the case."[22] The district court in *Franklin III* applied this principle to plaintiffs' prior action, explaining that its decision was fully on the merits:

> In the instant action, defendants contend that explicit provisions contained in the APA and FTCA preclude the court from entertaining plaintiffs' claims. Because plaintiffs predicate their suit on these two statutes, the jurisdictional question before the court is intertwined

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[21] *Id.* (*citing Yapp* at 1227 (quoting *Restatement* § 24)).

[22] *Franklin*, 970 F.Supp. at 860 (quoting *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir.1995)).

> with the merits of the case. The court, therefore, will analyze defendants' motion pursuant to Rule 12(b)(6).[23]

The Tenth Circuit in *Franklin III* specifically considered and upheld the district court's analysis. Noting that the government had moved to dismiss the prior action under both Rules 12(b)(1) and 12(b)(6), it agreed with the district court that a motion to dismiss for lack of subject matter jurisdiction must be converted into a motion to dismiss for failure to state a claim or summary judgment "if the jurisdictional question is intertwined with the merits of the case."[24] The Tenth Circuit in *Franklin III* decided that the issue of whether the Federal Tort Claims Act's discretionary function exception applies was "such a [merits-based] question."[25]

Thus, plaintiffs' contention that the government's motion to dismiss in *Franklin III* was "in essence" decided on the basis of a lack of subject matter jurisdiction, and was not on the merits, does not accurately reflect the record. The district court in *Franklin III* dismissed the suit on the basis of Rule 12(b)(6) and thus the court's decision was entirely on the merits. "The dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is a 'judgment on the merits.'"[26] This rule applies equally to adversary proceedings in bankruptcy cases.[27]

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[23] *Id.* at 860-61.

[24] *Franklin III*, 180 F.3d at 1129 (quoting *Bell v. United States*, 127 F.3d 1226, 1228 (10th Cir.1997)).

[25] *Id.*

[26] *Federated Dep't. Stores, Inc. v. Moitie*, 452 U.S. 394, 399, n. 3, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981). *See also Mark Smith Constr. Co. v. United States*, 15 Cl.Ct. 32, 37, n. 8 (Cl.Ct.1988)(where the 12(b)(6) treatment results from the merits and jurisdictional issues being intertwined, the resulting dismissal will have full res judicata effects).

[27] *See, e.g., Wade v. Hopper*, 993 F.2d 1246, 1251-52 (7th Cir.) *cert. denied*, 510 U.S. 868, 114 S.Ct. 193, 126 L.Ed.2d 151 (1993)(dismissal of

This court finds that the second prong—identity of the parties—is also met. In the prior suit, FSC and FSA sued the United States and the FDIC, successor-in-interest to the RTC. These identical plaintiffs have sued the same defendants in the instant case. Thus, the parties are identical.

As to the third prong—identity of the cause of action in both suits—this court finds this element is met as well. In comparing the second amended complaint of the prior case (*Franklin III*) with the complaint filed in the instant case, this court observes that the causes of action and allegations asserted in Counts I through III of the complaint at issue in this case are identical, word-for-word, to Counts I through III in the second amended complaint of *Franklin III*.

Although the present complaint attempts to assert two new causes of action in Counts IV and V, this court finds that those assertions are in fact simply allegations that were previously subsumed within Count I of the second amended complaint in *Franklin III*. Count IV asserts a claim of negligence and generally alleges that the RTC owed a duty under Kansas law to FSA and its stockholders to exercise reasonable care in the management and operation of FSA. It further alleges that the "RTC breached its *duty of care* in failing to operate and conduct the business of FSA in a prudent manner."[28] Count V asserts a breach of fiduciary duty claim, stating "RTC, as director and officer of FSA, *breached its fiduciary duty* to FSA and its stockholders, including FSC."[29] In Count I of the prior complaint (and indeed Count I of the instant complaint), plaintiffs allege that

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an adversary proceeding in bankruptcy for failure to state a claim was "a final adjudication on the merits" that precluded a second action on the same claim).

[28] Adversary Case No. 00-6029, Complaint filed February 8, 2000 (Doc. # 1), at ¶ 52, p. 32 (emphasis added).

[29] *Id.* at ¶ 56, p. 33 (emphasis added).

the RTC acted with "*negligence* and *breach[ed] [its] fiduciary duty* in failing to carry on the business of FSA, [and] in failing to act to protect the assets and economic viability of FSA . . . ."[30] Counts IV and V simply reallege assertions from Count I that are now broken out into separate causes of action. Thus, these claims were essentially raised by the parties and ruled upon by Judge VanBebber in the district court decision in *Franklin III*.

Furthermore, under the transactional approach of the *Restatement (Second) of Judgments* followed in this circuit, this court finds that the claims raised in Counts IV and V share an identity with the claims raised in Count I of the prior suit. The claims arise "out of the same 'transaction, or series of connected transactions'"[31] as the previous suit. The facts are related "in time, space, and origin."[32] Likewise, the claim raised in Count VI (violation of K.S.A. § 17-5812, alleging that the RTC, acting as a director and officer of FSA, engaged in "unauthorized and ultra vires" acts) shares an identity with the claims raised in the previous suit inasmuch as the allegations in Count VI also arise out of the same transaction or series of transactions as the previous suit.

Finally, to the extent Counts IV, V, and VI may present new claims, claim preclusion prevents the parties "from relitigating issues that were *or could have been raised* in"[33] an earlier action. Plaintiffs have provided the court with no

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[30] Civil Action No. 95-2100-GTV, Second Amended Complaint filed December 2, 1996, at ¶ 42, p. 26 (emphasis added).

[31] *Yapp*, 186 F.3d at 1227 (quoting *Restatement (Second) of Judgments* § 24 (1982)).

[32] *Id.* (quoting *Restatement (Second) of Judgments* § 24 (1982)).

[33] *Mitchell*, 218 F.3d at 1202 (quoting *Clark v. Haas Group, Inc.*, 953 F.2d at 1238).

convincing argument as to why these "new claims" could not have been raised in the previous suit.[34]

Plaintiffs attempt to evade the res judicata bar by arguing that 11 U.S.C. § 106(b) constitutes a separate waiver of sovereign immunity, apart from the Federal Tort Claims Act. Thus, they contend, the discretionary function exception of the FTCA does not apply to bar their claims. Plaintiffs broadly allege that "neither the FTCA nor the usual limitations associated with the assertion of tort claims against the government apply in a bankruptcy context."[35] The defendants, on the other hand, maintain that § 106 does not expose governments to causes of action from which they would be immune in a non-bankruptcy context. This court therefore must resolve the apparent conflict between waiver of sovereign immunity under § 106(b) and the FTCA's waiver provisions.

Defendants argue that plaintiffs' interpretation is contrary to the explicit language of § 106 itself, its legislative history, and the case law interpreting it. This court agrees. Bankruptcy Code § 106, part of the Bankruptcy Reform Act of 1978 (Pub.L. No. 95-598), provides a limited waiver of sovereign immunity in certain bankruptcy proceedings. The 1994 amendments to § 106, Pub.L. No. 103-394, Title I, § 113, 108 Stat. 4117 (1994), made clear that § 106 creates no

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[34] Similarly, this court finds that plaintiffs have provided the court with no convincing argument as to why their § 106 jurisdictional theory, *infra*, could not have been raised in the previous suit. Res judicata bars the parties from relitigating issues that were or could have been raised in a previous action, even if the subsequent action is based upon different legal theories.

[35] Plaintiffs' Response in Opposition to Defendant's Motion to Dismiss filed May 1, 2000 (Doc. # 13) at 9.

claim or cause of action. Subsection 106(a)(5) was added, providing that:

> *Nothing in this section shall create any substantive claim for relief or cause of action not otherwise existing* under this title, the Federal Rules of Bankruptcy Procedure, or nonbankruptcy law.[36]

Thus, while §§ 106(b) and (c) waive sovereign immunity for counterclaims against the United States, any substantive rights asserted therein must have some independent legal basis.[37] Accordingly, because plaintiffs' complaint sounds in tort, it is subject to the substantive requirements of the Federal Tort Claims Act, which provides the exclusive remedy for tort claims against the United States under non-bankruptcy law, 28 U.S.C. § 2679.

The legislative history also supports the conclusion that a party should not be permitted to pursue a tort claim in bankruptcy that the party would be unable to pursue outside of bankruptcy:

> Section 106 provides for a limited waiver of sovereign immunity in bankruptcy cases. Though Congress has the power to waive sovereign immunity for the Federal government completely in bankruptcy cases, *the policy followed here is designed to achieve approximately the same result that would prevail outside of bankruptcy.*[38]

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[36] 11 U.S.C. § 106(a)(5)(emphasis added).

[37] *Hardy v. United States*, 97 F.3d 1384, 1388 (11th Cir.1996); *Thomas v. Resolution Trust Corp. (In re Thomas)*, 184 B.R. 237, 242 (Bankr. M.D.N.C.1995).

[38] Sen. Rep. 95-989, 95th Cong., 2d Sess. reprinted in 1978 U.S.Code Cong. and Adm. News 5787, 5815 (emphasis added).

Additionally, the legislative history confirms that already established boundaries of sovereign immunity would not be affected by the passage of Section 106:

> This section does not confer sovereign immunity on any governmental unit that does not already have immunity. It simply recognizes any immunity that exists and prescribes the proper treatment of claims by and against that sovereign.[39]

Plaintiffs cite the cases of *Anderson v. Federal Deposit Insurance Corporation*[40] and *Ashbrook v. Block*[41] for the proposition that because they are proceeding under the waiver contained in § 106, none of the substantive limitations on liability contained within the FTCA apply. These cases, however, merely dealt with the procedural issue of whether the FTCA's administrative claim process had to be complied with prior to raising tort counterclaims under § 106.[42] Moreover, the court in *Ashbrook* recognized that substantive limitations on the United States' liability outside of bankruptcy would still apply to counterclaims under § 106. Even though plaintiffs in *Ashbrook* asserted counterclaims within the waiver of § 106, the court nonetheless dismissed their "Bivens" action against the United States on the grounds that it was barred by sovereign immunity.[43]

Thus, *Ashbrook* demonstrates the need to follow a two-step inquiry under § 106. First, it must be determined whether the requirements of § 106 are met so as to allow the bringing of whatever claims the estate may have arising out of the same transaction. Second, because § 106 does not create any cause

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[39] *Id.* at 5816.

[40] 918 F.2d 1139, 1143 (4th Cir.1990).

[41] 917 F.2d 918 (6th Cir.1990).

[42] *See, e.g., Ashbrook*, 917 F.2d at 922.

[43] *Id.* at 924.

of action, the definitions and limitations on the substantive cause of action existing outside of bankruptcy law must be identified and applied.

This result, that § 106 dispenses with procedural but not substantive limitations on federal liability, is fully consistent with, and indeed fulfills, the principle set forth in the cases cited by plaintiffs that courts are to "harmonize" the general waiver of immunity contained in § 106 with more specific waivers such as the FTCA.[44]

Indeed, this is the precise result reached by the district court in *TPI International Airways, Incorporated v. Federal Aviation Administration*.[45] Applying *Anderson* and *Ashbrook*, the court in *TPI International Airways* held that, in order to harmonize the FTCA and the Bankruptcy Code, the procedural provisions of § 2675(a) of the FTCA would be deemed waived by the filing of a proof of claim but that the substantive provisions of the FTCA, including the discretionary function exception, still applied to claims relying on the waiver of immunity contained in § 106.[46]

This court wholly concurs with the reasoning and analysis of the district court in *TPI International Airways*. Applying that analysis to the claims before this court, the court finds that the FTCA is applicable and that any waiver of sovereign immunity under § 106(b)[47] does not supercede the FTCA.

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[44] *Anderson*, 918 F.2d at 1143 ("court should, if possible, construe statutes harmoniously"); *Ashbrook*, 917 F.2d at 922 (discussing the "task of harmonizing" the two statutes).

[45] No. CV292-230 (S.D.Ga. Dec. 12, 1992).

[46] *TPI Int'l Airways*, No. CV292-230, at 10-12. (In 1994, § 106(a) was redesignated as § 106(b). Therefore, references to § 106(a) in *TPI Int'l Airways*, decided in 1992, refer to what is now § 106(b).)

[47] This court need not decide whether the three conditions under § 106(b) are met—(1) whether the estate has a claim against the governmental unit and the governmental unit has a claim against the estate;

This court observes that plaintiffs' overly-broad interpretation of § 106 would also be inconsistent with the well-settled principle that the FTCA is the exclusive means by which a party may sue the United States for money damages for claims sounding in tort. The FTCA itself provides that "[t]he remedy against the United States . . . *is exclusive of any other civil action or proceeding* for money damages . . . ." 28 U.S.C. § 2679(b)(1). The courts have also consistently held that affirmative tort claims against the federal government must be brought under the FTCA.[48]

Under plaintiffs' conception of how § 106 functions, there would be concurrent yet substantially different methods for suing the United States for money damages for causes of action sounding in tort: 1) the FTCA, for claims brought in district court, with all the prerequisites and limitations applied in full, and 2) § 106 tort claims, with none of the FTCA's limitations and requirements. Such a result undermines Congress' intention, set forth in § 2679(b), to make the FTCA the *exclusive* means by which the United States is subjected to liability for claims sounding in tort.

In sum, given the fact that Congress intended only a limited change in passing the Bankruptcy Act of 1978 and

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(2) whether the claim against the governmental unit is property of the estate; and (3) whether the claims of each must arise out of the same transaction or occurrence. This is because even assuming all three criteria are met, plaintiffs still need to meet the substantive requirements of the FTCA. Plaintiffs are unable to meet the substantive requirements of the FTCA because this court has determined, *supra* at 525, that res judicata applies and that the district court in the prior action ruled the discretionary function exception applies to bar plaintiffs' claims.

[48] *Franklin Savings Corp.*, 180 F.3d at 1142 ("Thus, if a suit is 'cognizable' under [28 U.S.C.] § 1346(b) of the FTCA, the FTCA remedy is 'exclusive . . . .'") (quoting *FDIC v. Meyer*, 510 U.S. 471, 476, 114 S.Ct. 996, 127 L.Ed.2d 308 (1994)); *Ascot Dinner Theatre, Ltd. v. SBA*, 887 F.2d 1024, 1027 (10th Cir.1989)(same).

sought to prevent claims brought under § 106 from being treated differently from claims brought outside the bankruptcy context, the result advocated by plaintiffs is unwarranted. Thus, this court declines plaintiffs' invitation to adopt their theory that § 106 has created an entirely new mechanism for filing suit for affirmative money damages against the United States with none of the limitations that Congress established for filing such suits under the FTCA.

In light of the foregoing, this court need not address defendants' various other grounds advanced in support of their motion to dismiss.

IT IS THEREFORE ORDERED that the defendants' Motion to Dismiss Plaintiffs' Complaint (Doc. # 6) is hereby granted.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 03-3239

In re: FRANKLIN SAVINGS CORPORATION,
Debtor,

FRANKLIN SAVINGS CORPORATION;
FRANKLIN SAVINGS ASSOCIATION,
Plaintiffs-Appellants,
v.

UNITED STATES OF AMERICA;
FEDERAL DEPOSIT INSURANCE CORPORATION,
Defendants-Appellees.

Filed December 29, 2004

ORDER

Before TACHA, Chief Judge, MURPHY, Circuit Judge CAUTHRON *, Chief District Judge.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

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* The Honorable Robin J. Cauthron, Chief District Judge, United States District Court for the Western District of Oklahoma, sitting by designation.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/ Stan Law
Deputy Clerk

Supreme Court, U.S.
FILED
JUL 6 - 2005
OFFICE OF THE CLERK

(2)

No. 04-1462

In the Supreme Court of the United States

FRANKLIN SAVINGS CORPORATION AND FRANKLIN SAVINGS ASSOCIATION, PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether a bankruptcy estate may assert tort claims against the United States pursuant to 11 U.S.C. 106 when those claims are barred by the Federal Tort Claims Act's statute of limitations, 28 U.S.C. 2401(b).

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 8
Conclusion 19

TABLE OF AUTHORITIES

Cases:

Anderson v. *FDIC*, 918 F.2d 1139 (4th Cir. 1990) 14, 15, 16
Ashbrook v. *Block*, 917 F.2d 918 (6th Cir. 1990) 14, 15, 16
FDIC v. *Meyer*, 510 U.S. 471 (1994) 9, 10
Feres v. *United States*, 340 U.S. 135 (1950) 13
Florida Auto Auction of Orlando, Inc. v. *United States*, 74 F.3d 498 (4th Cir. 1996) 13
Franklin Sav. Ass'n v. *Office of Thrift Supervision*:
934 F.2d 1127 (10th Cir. 1991), cert. denied, 503 U.S. 937 (1992) 4
35 F.3d 1466 (10th Cir. 1994) 5
Franklin Sav. Corp. v. *Office of Thrift Supervision*, 213 B.R. 596 (D. Kan. 1997) 5

Cases—Continued: Page

Franklin Sav. Corp. v. United States:
970 F. Supp. 855 (D. Kan. 1997), aff'd, 180 F.3d 1124 (10th Cir.), cert. denied, 528 U.S. 964 (1999) 5, 9
56 Fed. Cl. 720 (2003) 6
97 Fed. Appx. 331 (Fed. Cir. 2004), cert. denied, 125 S. Ct. 1694 (2005) 6
Hancock v. Train, 426 U.S. 167 (1976) 10
Howell v. United States, 932 F.2d 915 (11th Cir. 1991) 14
Key Tronic Corp. v. United States, 511 U.S. 809 (1994) 11
M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 10
Montana v. United States, 440 U.S. 147 (1979) 18
Myers v. United States, 17 F.3d 890 (6th Cir. 1994) 14
Northridge Bank v. Community Eye Care Ctr., Inc., 655 F.2d 832 (7th Cir. 1981) 15
Orthopedic Bone Screw Prod. Liab. Litig., In re, 264 F.3d 344 (3d Cir. 2001), cert. denied, 535 U.S. 1095 (2002) 13
Supreme Beef Processors, Inc., In re, 391 F.3d 629 (5th Cir. 2004) 14, 17
Town & Country Home Nursing Servs., Inc., In re, 963 F.2d 1146 (9th Cir. 1992) 14, 15
United States v. Mitchell, 463 U.S. 206 (1983) 12
United States v. Smith, 499 U.S. 160 (1991) 2, 10

Cases—Continued: Page

United States Postal Serv. v. *Flamingo Indus. (USA) Ltd.*, 540 U.S. 736 (2004) 9

University Med. Ctr. v. *Sullivan*, 973 F.2d 1065 (3d Cir. 1992) 16, 17

Constitution, statutes and rule:

U.S. Const. Art. VI, Cl. 2 (Supremacy Clause) 10

Administrative Procedure Act, 5 U.S.C. 701 *et seq.* 5

Bankruptcy Code, 11 U.S.C. 101 *et seq.*:

11 U.S.C. 106 ..... *passim*

11 U.S.C. 106(a)(5) 4, 9, 12, 15, 16

11 U.S.C. 106(b) 3, 4, 9, 12, 19

11 U.S.C. 106(c) 3, 4, 9, 12

11 U.S.C. 362 16

11 U.S.C. 541(a)(1) 9

Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, Tit. I, § 113, 108 Stat. 4117 9

Federal Tort Claims Act:

28 U.S.C. 1346(b) 13, 16

28 U.S.C. 1346(b)(1) 2, 12, 13

28 U.S.C. 2401(b) 3, 7, 8, 9, 10

28 U.S.C. 2671-2680 ..... 2, 12

28 U.S.C. 2674 ..... 2, 11, 14

28 U.S.C. 2675(a) 15

28 U.S.C. 2679(a) 7, 10, 16

28 U.S.C. 2679(b)(1) 2, 10

28 U.S.C. 2680 ..... 12, 13, 17

Statutes and rule—Continued: Page

28 U.S.C. 2680(a) 2, 5, 8, 9, 10

28 U.S.C. 2680(h) 3

28 U.S.C. 2680(k) 3

Medicare Act, 42 U.S.C. 405(h) 16

Fed. R. Civ. P. 12(b)(6) 18

Miscellaneous:

57 Fed. Reg. 41,969 (1992) 5

H.R. Rep. No. 595, 95th Cong., 1st Sess. (1977) 15

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No. 01-1462

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 385 F.3d 1279. The order of the district court (Pet. App. 18a-30a) is unreported. The order of the bankruptcy court (Pet. App. 31a-46a) is reported at 296 B.R. 521.

JURISDICTION

The judgment of the court of appeals was entered on October 7, 2004. A petition for rehearing was denied on December 29, 2004 (Pet. App. 47a-48a). On March 17, 2005, Justice Breyer extended the time within which to file a petition for a writ of certiorari to and including April 28, 2005, and the petition was filed on that date.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The tort liability of the United States is defined by the Federal Tort Claims Act (FTCA), which provides in part that "[t]he United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. 2674 (first sentence). The FTCA also provides that "[s]ubject to the provisions of chapter 171 of this title," *i.e.*, 28 U.S.C. 2671-2680, the district courts "shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, * * * for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)(1). The FTCA further provides that the remedies provided by the Act are "exclusive of any other civil action or proceeding." 28 U.S.C. 2679(b)(1); *United States* v. *Smith*, 499 U.S. 160, 161-162 (1991).

Although the FTCA incorporates state tort law by permitting tort claims against the United States under circumstances in which a private person would be liable under state law, Congress shielded the United States from liability in a variety of circumstances regardless of the provisions of state law. For instance, the FTCA excepts from its coverage claims based upon the performance of discretionary governmental functions, 28

U.S.C. 2680(a), claims involving intentional torts, 28 U.S.C. 2680(h), and claims arising in a foreign country, 28 U.S.C. 2680(k). In addition, the FTCA is subject to a uniform, federal statute of limitations, set forth in Section 2401(b), which provides that "[a] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing * * * of notice of final denial of the claim by the agency to which it was presented." 28 U.S.C. 2401(b).

b. Section 106 of the Bankruptcy Code, 11 U.S.C. 106, waives the immunity of governmental units, including the United States, the States, and foreign sovereigns, in bankruptcy proceedings. In relevant part, Section 106 provides:

> **Waiver of sovereign immunity**
>
> * * * * *
>
> (b) A governmental unit that has filed a proof of claim in the case is deemed to have waived sovereign immunity with respect to a claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which the claim of such governmental unit arose.
>
> (c) Notwithstanding any assertion of sovereign immunity by a governmental unit, there shall be offset against a claim or interest of a governmental unit any claim against such governmental unit that is property of the estate.

11 U.S.C. 106(b) and (c).

Section 106(b) thus permits a bankruptcy estate to assert a compulsory counterclaim against a governmental entity that has filed a proof of claim in bankruptcy against the estate, while Section 106(c) permits the estate to assert an unrelated claim against a governmental entity that has filed a proof of claim, but only up to the amount of a setoff. Section 106 further provides that "[n]othing in this section shall create any substantive claim for relief or cause of action not otherwise existing under this title, the Federal Rules of Bankruptcy Procedure, or nonbankruptcy law." 11 U.S.C. 106(a)(5).

2. Petitioner Franklin Savings Corporation (FSC) was the owner of approximately 94% of the stock of petitioner Franklin Savings Association (FSA), a failed savings and loan institution, which was placed into conservatorship in 1990, and into receivership and liquidation in 1992. See Pet. App. 2a-3a, 18a. This case is the latest in a long series of unsuccessful legal challenges and damages claims pursued by petitioners in various courts.

a. In 1990, the Director of the Office of Thrift Supervision (OTS) determined that FSA was "in an unsafe and unsound condition to transact business" and appointed the Resolution Trust Corporation (RTC) as its conservator. Pet. App. 32a. FSA and FSC subsequently filed a lawsuit, known as *Franklin I*, seeking removal of the conservator. The court of appeals upheld the Director's decision, and this Court denied review. *Franklin Sav. Ass'n v. Office of Thrift Supervision*, 934 F.2d 1127, 1150-1151 (10th Cir. 1991), cert. denied, 503 U.S. 937 (1992).

In July 1992, the Director converted RTC's role from that of conservator to receiver and ordered RTC to

liquidate FSA. Pet. App. 3a, 20a; See 57 Fed. Reg. 41,969 (1992). FSA and FSC filed a lawsuit, known as *Franklin II*, challenging the Director's decision. The court of appeals held that the decision was not subject to judicial review. *Franklin Sav. Ass'n* v. *Office of Thrift Supervision*, 35 F.3d 1466, 1469-1471 (10th Cir. 1994).

Meanwhile, on July 26, 1991, FSC had filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Kansas. In 1993, petitioners filed an adversary complaint in the bankruptcy court seeking tort damages of $820 million and relief under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, for certain actions of the Resolution Trust Corporation while it was acting as conservator for FSA. That action, known as *Franklin III*, was eventually transferred to the district court, where it was dismissed on several grounds. Among other things, the district court held that the tort claims were barred by the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. 2680(a). *Franklin Sav. Corp.* v. *United States*, 970 F. Supp. 855, 867 (D. Kan. 1997). That dismissal was upheld on appeal, and this Court denied review. *Franklin Sav. Corp.* v. *United States*, 180 F.3d 1124 (10th Cir.), cert. denied, 528 U.S. 964 (1999).

Also in 1993, petitioners filed additional claims in the bankruptcy proceeding alleging that the Director's imposition of a conservatorship and receivership upon FSA, and disposition of FSA's assets, constituted an unconstitutional taking of their property. The takings claims were transferred to the district court, which in turn transferred the claims to the Court of Federal Claims. *Franklin Sav. Corp.* v. *Office of Thrift Supervision*, 213 B.R. 596, 601-602 (D. Kan. 1997). On June

16, 2003, the Court of Federal Claims granted the government's motion for summary judgment, denied petitioners' motion for summary judgment, and ordered the entry of judgment in the government's favor. *Franklin Sav. Corp.* v. *United States*, 56 Fed. Cl. 720 (2003). The Federal Circuit affirmed in an unpublished opinion. *Franklin Sav. Corp.* v. *United States*, 97 Fed. Appx. 331 (Fed. Cir. 2004). This Court recently denied certiorari in that case. 125 S. Ct. 1694 (2005).

b. In the meantime, on February 8, 2000, petitioners filed the present action as another adversary proceeding in the bankruptcy court, reasserting their tort claims seeking $820 million. As the jurisdictional basis for their claims, petitioners invoked Section 106 of the Bankruptcy Code, 11 U.S.C. 106.[1]

The bankruptcy court granted the defendants' motion to dismiss the complaint. Pet. App. 46a. The bankruptcy court held that petitioners' claim was barred by the doctrine of res judicata, explaining that the complaint was "virtually identical" "with respect to the actual parties, allegations, and legal claims" asserted in the *Franklin III* action. *Id.* at 34a, 37a-41a.

3. The district court affirmed the bankruptcy court's res judicata ruling. Pet. App. 18a-30a. The district court rejected petitioners' argument that the res judicata bar did not apply because petitioners had asserted 11 U.S.C. 106 as a new jurisdictional basis for their new complaint. The court explained that this theory was "contrary to the doctrine of claim preclusion." Pet. App. 29a.

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[1] Various federal agencies beginning in 1991 had filed proofs of claims against FSC. 00-6029 Complaint 4-6 (Bankr. D. Kan. filed Feb. 8, 2000).

The district court further held that Section 106 did not provide petitioners with an avenue for suing the United States in tort under Kansas state law, because Congress had made clear that the FTCA is the "exclusive remedy for tort claims against the United States." Pet. App. 29a. The district court explained that, "[a]ssuming Franklin Savings meets the requirements of § 106(b) * * * , that section merely provides a waiver of sovereign immunity; Franklin Savings must still point to a source of law for its causes of action." *Ibid.*

4. The court of appeals affirmed. Pet. App. 1a-17a. The court did not reach the question of whether the complaint was barred by res judicata. Instead, the court held that the case was properly dismissed because it was barred by the FTCA's statute of limitations, 28 U.S.C. 2401(b), which provides that a tort claim against the federal government shall be forever barred if it is not presented to the relevant federal agency within two years of accrual and filed in district court within six months of denial by the agency. Pet. App. 6a-7a. Because petitioners did not dispute that their claims (which involved events that transpired between 1990 and 1992) had expired before the present action was commenced in 2000, the court of appeals held that the claim was barred. *Id.* at 10a, 17a.

The court of appeals explained that the FTCA supplies the relevant limitations period because that Act "provides the exclusive avenue to assert a claim sounding in tort against the United States." Pet. App. 7a-8a (citing 28 U.S.C. 2679(a)). The court of appeals accordingly rejected petitioners' argument that the waiver of sovereign immunity contained in Section 106 of the Bankruptcy Code renders inoperative the pro-

visions of the FTCA, including its statute of limitations and exclusions. *Id.* at 11a-12a. The court explained that "Section 106 is simply a waiver of sovereign immunity; it does not create a claim for relief." *Id.* at 12a. The court of appeals also observed that "[i]t would be extraordinarily unfair to the United States if the mere filing of a proof of claim in a bankruptcy proceeding subjected it to liability for untimely claims, leaving it without recourse to the usual protections from stale claims available to it in any other, non-bankruptcy proceeding." *Id.* at 16a.

ARGUMENT

Petitioners seek review of the court of appeals' determination that the waiver of sovereign immunity set forth in Section 106 of the Bankruptcy Code does not vitiate the substantive provisions of the FTCA, including its statute of limitations. The court of appeals correctly decided that the action was barred by the FTCA's statute of limitations, Pet. App. 6a-7a, and petitioner's tort claims in any event would be barred by the FTCA's discretionary function exception and principles of res judicata. The petition therefore does not warrant this Court's review.

1. a. Petitioners do not dispute that all of their claims sound in tort and that their claims may not be brought under the FTCA, because the claims are untimely under 28 U.S.C. 2401(b), and because—as the Tenth Circuit held in petitioner's prior action—they are barred by the Act's exception for discretionary functions, 28 U.S.C. 2680(a). Pet. App. 4a, 5a, 34a, 39a. Petitioners nonetheless argue (Pet. 10) that because Section 106 independently waives the United States's

sovereign immunity from suit, their action may be maintained. That contention is fundamentally unsound.

There are two prerequisites to the imposition of liability against the United States: a waiver of sovereign immunity *and* a source of substantive law that establishes a cause of action against the United States. *FDIC* v. *Meyer*, 510 U.S. 471, 483-484 (1994); *United States Postal Serv.* v. *Flamingo Indus. (USA) Ltd.*, 540 U.S. 736, 742-744 (2004). Although Section 106 contains, as its title indicates, a waiver of sovereign immunity, it does not itself confer a right of action against the United States (much less one for alleged torts). Quite to the contrary, Congress in 1994 amended Section 106 to make explicit that "*[n]othing in this section shall create any substantive claim for relief or cause of action not otherwise existing under* this title, the Federal Rules of Bankruptcy Procedure, or *nonbankruptcy law*." 11 U.S.C. 106(a)(5) (emphasis added); see Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, Tit. I, § 113, 108 Stat. 4117.

The conclusion that Section 106 creates no liability is further confirmed by the requirement that claims against the United States under Section 106 must be "property of the estate," 11 U.S.C. 106(b) and (c). The property of the estate generally consists of "all legal or equitable interests of the debtor in property as of the commencement of the case," *i.e.*, the filing of the bankruptcy petition. 11 U.S.C. 541(a)(1). Absent the bankruptcy petition and petitioners' reliance on Section 106, petitioners have no tort claims against the United States by virtue of 28 U.S.C. 2401(b)—and by virtue of the discretionary function exception, 28 U.S.C. 2680(a), under which the court of appeals held in *Franklin III* that petitioners' tort claims are barred (see 180 F.3d

1130-1142). Yet petitioners are attempting in the bankruptcy case to enlarge the rights of the estate by creating tort liability where none previously existed.

Other than state law, petitioners do not point to any source of "nonbankruptcy law" imposing substantive liability on the United States for torts. Pet. 8. State law, however, generally provides no cause of action against the United States. *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 426 (1819); *Hancock* v. *Train*, 426 U.S. 167, 178-179 (1976). Indeed, the Supremacy Clause preempts any state law purporting to establish tort liability on the part of the United States in this case. Here, Congress made unmistakably clear that litigants in petitioners' position may not recover on tort claims against the United States. Thus, Congress directed that any "tort claim against the United States *shall be forever barred*" when not presented within two years of a claim's accrual or within six months of an administrative denial of the claim. 28 U.S.C. 2401(b) (emphasis added). Congress likewise barred tort claims when based on an exercise of the government's discretionary function. 28 U.S.C. 2680(a). Finally, Congress provided that the FTCA remedy "is *exclusive* of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim." 28 U.S.C. 2679(b)(1) (emphasis added); accord 28 U.S.C. 2679(a); see also *FDIC* v. *Meyer*, 510 U.S. at 476; *United States* v. *Smith*, 499 U.S. 160, 161-162 (1991).

It is therefore irrelevant in this case that the FTCA in part incorporates standards of state law. *FDIC* v. *Meyer*, 510 U.S. at 478 (noting that the FTCA incorporates the "law of the place" where the act or omission occurred). While the FTCA, like some other federal

statutes, incorporates state law as the appropriate standard of liability, *Congress* itself, in the FTCA, established the United States' liability for the torts of federal employees as a matter of federal law subject to a range of conditions, limitations, and exceptions that are independent of the provisions of state law. See 28 U.S.C. 2674 ("The United States shall be liable * * * ."); *Key Tronic Corp.* v. *United States*, 511 U.S. 809, 818 n.11 (1994). Petitioners cannot point to any statute that imposes substantive liability on the United States for tort actions independent of the FTCA. That failure is fatal, because the FTCA unquestionably bars the claims in this case

There is, in short, no basis to conclude that Congress intended Section 106 to subject the United States in bankruptcy proceedings to new and unprecedented forms of liability that, outside of bankruptcy, are explicitly precluded under the statutes defining the contours of governmental liability. Thus, if, as petitioners suggest, the provisions of the FTCA defining the scope of the liability of the United States were not relevant under Section 106, the result in bankruptcy court would bear no resemblance to that outside bankruptcy court. Instead, by filing for bankruptcy, debtors facing a proof of claim by the federal government would be in a substantially more favorable position than their counterparts outside bankruptcy, possessed of causes of action unavailable to those who do not file a petition. Petitioners have pointed to no statutory language or legislative history under the Code supporting such a

bizarre and anomalous result, and the plain language of Section 106(a)(5) explicitly precludes it.[2]

b. Petitioners argue (Pet. 15-17) that the court of appeals erroneously held that the FTCA provides a cause of action when, in their view, the FTCA solely reflects a waiver of sovereign immunity. As discussed above, however, absent Congress's affirmative establishment in the FTCA of the United States' liability for certain torts as a matter of federal law and the resulting cause of action against the United States, the FTCA's waiver of sovereign immunity from suit alone would be insufficient. Pp. 9-11, *supra*.

That conclusion is also reflected in the terms and structure of the FTCA. Thus, 28 U.S.C. 1346(b)(1) confers jurisdiction of federal district courts and waives the sovereign immunity of the United States for tort claims, "[s]ubject to the provisions of chapter 171," *i.e.*, 28 U.S.C. 2671-2680. See *United States* v. *Mitchell*, 463 U.S. 206, 212-216 (1983) (construing Tucker Act grant of jurisdiction as a waiver of sovereign immunity, subject to substantive liability standards created elsewhere). The provisions of Sections 2671-2680, including the exceptions set forth in Section 2680, create and define the scope of the United States' substantive tort liability.

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[2] Contrary to petitioners' contention, reading Section 106 in accordance with its plain terms, *i.e.*, to waive sovereign immunity but otherwise not to expand the scope of tort liability of the United States beyond that set forth in the FTCA, does not render Section 106(b) and (c) "meaningless." Pet. 11. Those Code provisions represent a waiver of sovereign immunity. Thus, they make clear that the bankruptcy court may hear an action against a state governmental entity. Similarly, the provisions permit bankruptcy courts to hear tort claims against the federal government notwithstanding 28 U.S.C. 1346(b)(1), which grants district courts "exclusive jurisdiction" to hear tort claims against the United States.

Because they are incorporated into Section 1346(b)(1), they are *also* conditions on the waiver of sovereign immunity. Thus, Section 2680 provides that *neither* the "provisions of this chapter" (*i.e.*, the FTCA's substantive provisions), *nor* Section 1346(b) (*i.e.*, the waiver of sovereign immunity) apply to claims falling within the exceptions. Those provisions thus reflect congressional intent both to waive sovereign immunity and to impose substantive tort liability on the United States, but only under the precise conditions set forth in the Act.

Petitioners also err in asserting a conflict between the decision below and decisions stating that the FTCA does not create a new cause of action. Pet. 15-16. The decisions cited by petitioners stand for a proposition as to which there is no dispute in this case: that the tort liability to which the United States subjected itself in the FTCA is limited to traditional common-law tort liability reflected in state law, and does not extend to novel tort claims not recognized under the state tort law applicable to private persons.[3] *Feres* v. *United States*, 340 U.S. 135, 141-142 (1950) (finding that the FTCA does not provide a basis for a soldier on active duty to sue the United States for negligence because a private person in like circumstances would not be liable under state law); *In re Orthopedic Bone Screw Prod. Liab. Litig.*, 264 F.3d 344, 362 (3d Cir. 2001) (explaining that state law generally defines the extent of the United States' liability under the FTCA), cert. denied, 535 U.S. 1095 (2002); *Florida Auto Auction of Orlando, Inc.* v. *United States*, 74 F.3d 498, 502 (4th Cir. 1996) (concluding that an alleged breach of duty under

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[3] The government discusses this principle in depth in its merits brief in *United States* v. *Olson*, No. 04-759 (filed Apr. 25, 2005).

Federal law does not, by itself, state a valid tort claim under the FTCA); *Howell* v. *United States*, 932 F.2d 915, 917 (11th Cir. 1991) ("Congress's chief intent in drafting the FTCA was simply to provide redress for ordinary torts recognized by state law.") (citation omitted); *Myers* v. *United States*, 17 F.3d 890, 894 (6th Cir. 1994) (FTCA "constitutes consent to suit and is fundamentally limited to cases in which 'a private individual [would be liable] under like circumstances.'") (quoting 28 U.S.C. 2674). None of those decisions holds, as petitioners urge, that a simple waiver of sovereign immunity, standing alone, is sufficient to render the United States liable for a state law cause of action. A fortiori, none of those decisions supports the proposition that the United States may be liable for tort damages under circumstances explicitly precluded by the FTCA itself.

2. Petitioners further assert that there is a "well-developed" conflict of authority on the question presented. Pet. 9. But most of the cases upon which they rely are distinguishable from the present case. And the one case that does conflict with the decision below is the subject of a pending petition for rehearing en banc. Review by this Court is therefore not warranted at this time.

Petitioners cite four cases from other courts of appeals that they contend are in conflict with the decision below: *Anderson* v. *FDIC*, 918 F.2d 1139 (4th Cir. 1990); *Ashbrook* v. *Block*, 917 F.2d 918 (6th Cir. 1990); *In re Town & Country Home Nursing Servs., Inc.*, 963 F.2d 1146 (9th Cir. 1992); and *In re Supreme Beef Processors, Inc.*, 391 F.3d 629 (5th Cir. 2004). The first three of those decisions were decided before Congress in 1994 amended Section 106 to state that it

does not "create any substantive claim for relief or cause of action not otherwise existing under * * * non-bankruptcy law." 11 U.S.C. 106(a)(5). To the extent that the decisions are inconsistent with that provision, they have lost their validity, and those circuits should have the opportunity to consider the issue in light of Congress's subsequent enactment.

Equally important, *Anderson*, *Ashbrook*, and *Town & Country*, do not involve the question of whether the *substantive* requirements and limitations of the FTCA, including the statute of limitations or the discretionary function exception apply to actions brought under Section 106. Those decisions held that a debtor is not required to comply with the *procedural* requirement of exhausting administrative remedies before filing an FTCA claim under Section 106. *Anderson*, 918 F.2d at 1143; *Ashbrook*, 917 F.2d at 921-923; *Town & Country*, 963 F.2d at 1154-1155. Whether or not those decisions are correct, they do not fundamentally alter the substantive scope of the government's tort liability. For instance, the FTCA does not require exhaustion of administrative remedies when tort claims against the United States are brought as compulsory counterclaims. 28 U.S.C. 2675(a).[1]

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[1] Although the FTCA's exhaustion requirement is excused for counterclaims, 28 U.S.C. 2675(a), that rule applies to compulsory, not permissive counterclaims. *Northridge Bank* v. *Community Eye Care Ctr., Inc.*, 655 F.2d 832, 836 (7th Cir. 1981). The government respectfully disagrees with *Anderson*, *Ashbrook*, and *Town & Country* to the extent that they hold that Section 106 eliminates the need to exhaust administrative remedies for tort claims brought as permissive counterclaims. See H.R. Rep. No. 595, 95th Cong., 1st Sess. 317 (1977) (Congress intended in Section 106 "to achieve approximately the same result that would prevail outside of bankruptcy"). *Anderson* also addressed the requirement that FTCA suits be filed against the United

Petitioners, by contrast, urge the far broader contention that Section 106 expands the substantive liability of the United States, by vitiating the substantive limitations on governmental liability set forth in the FTCA. *Anderson*, *Town & Country*, and *Ashbrook* do not squarely address that issue and thus would not be in square conflict with the court of appeals' decision even if they had not been superceded by the enactment of 11 U.S.C. 106(a)(5) in 1996. Indeed, *Ashbrook* appears to be consistent with the decision below in this regard. In *Ashbrook*, the Sixth Circuit affirmed the dismissal of a purported *Bivens* claim against the United States on sovereign immunity grounds, notwithstanding the waiver of sovereign immunity set forth in Section 106. *Ashbrook*, 917 F.2d at 924. The court thus appears to have recognized the need to apply relevant substantive limitations on the United States' liability when analyzing counterclaims brought under Section 106.[5]

States rather than particular agencies, holding that requirement, like the exhaustion requirement, inapplicable to counterclaims filed under Section 106. 918 F.2d at 1143-1144. This Court need not reach this issue, which was not addressed by the court of appeals below. We note, however, that the government also respectfully disagrees with *Anderson* in this regard, because FTCA suits must be brought against the United States, not its agencies. 28 U.S.C. 1346(b), 2679(a).

[5] For those reasons, petitioners also mistakenly argue (Pet. 14-15) that the decision below conflicts with *University Medical Center v. Sullivan*, 973 F.2d 1065 (3d Cir. 1992), which was decided before the 1994 Amendments to Section 106, and does not involve the question of whether Section 106 vitiates the substantive requirements of the FTCA. Rather, *Medical Center* holds that district courts have jurisdiction to hear claims that the Department of Health and Human Services violated the Bankruptcy Code's automatic stay provision, 11 U.S.C. 362, even though the plaintiff did not exhaust administrative remedies as required for claims arising under the Medicare Act, 42 U.S.C. 405(h). The court reasoned that the hospital's claim "arises under the

Petitioners emphasize that in *In re Supreme Beef Processors, Inc.*, *supra*, the Fifth Circuit applied Section 106(c) to permit the assertion of a tort claim for setoff even if it would be barred by the FTCA's statute of limitations or one of the exceptions in 28 U.S.C. 2680. 391 F.3d at 633-636 (permitting suit even though action would have been barred as untimely under the FTCA and barred by the Act's exception for intentional torts, and its requirement of administrative exhaustion). The government, however, has filed a petition for rehearing en banc in *In re Supreme Beef Processors, Inc.*, and the Fifth Circuit ordered the plaintiff to file a response to that petition. Order, No. 03-41345 (5th Cir. Jan. 24, 2005). If rehearing is granted, the conflict between *In re Supreme Beef Processors, Inc.* and the decision below may disappear entirely. Thus, while at some future time the issue raised by petitioners may warrant this Court's review, certiorari is premature in the absence of a certain and square conflict on the issue.

3. Finally, the present case would be a poor vehicle for certiorari because, even if the court of appeals had misconstrued Section 106 (which it did not), petitioners' complaint would still have been properly dismissed under the doctrine of res judicata or claim preclusion. As the district court and the bankruptcy court both concluded, the complaint in the present action involves the identical parties, alleged facts, and requested relief as the complaint in *Franklin III*, which was dismissed

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Bankruptcy Code and not under the Medicare statute." 973 F.2d at 1073. Significantly, the court did not rely on Section 106 as a basis for imposing liability on the United States. Rather, the court recognized that Section 106 waived immunity from suit and that the automatic stay provision was the basis for the substantive source of liability. *Medical Ctr.*, 973 F.2d at 1085-1087.

under Fed. R. Civ. P. 12(b)(6). Pet. App. 21a, 34a. Although the court of appeals did not reach the issue, the district court and the bankruptcy court correctly recognized that petitioners' new invocation of Section 106 of the Bankruptcy Code is insufficient to defeat the res judicata bar. Pet. App. 29a-30a, 40-41a.

Petitioners have repeatedly invoked the resources of the bankruptcy court, the district court, the Court of Federal Claims, the courts of appeals, and this Court in an unrelenting attempt to find some legal theory that will entitle them to relief. Agencies of the United States began to file proofs of claim in the bankruptcy proceedings as early as 1991 when a claim was filed on behalf of the Office of Thrift Supervision. See note 1, *supra* (Complaint 4). That was well before the district court dismissed their tort claims in 1997. Petitioners could have sought to rely on Section 106 as an independent basis for recovery in that case but they failed to do so and raised that issue for the first time in the court of appeals, which found the claim waived. Petitioners may not circumvent their default in failing to raise that claim by filing a new complaint in bankruptcy court. The doctrine of res judicata (claim preclusion) exists to prevent just such a drain on the resources of the courts and the parties. See *Montana* v. *United States*, 440 U.S. 147, 153-154 (1979) ("To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on

judicial action by minimizing the possibility of inconsistent decisions.").[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2005

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[6] Although the United States assumed for the sake of argument, solely for purposes of the appeal, that Section 106(b) is applicable here, that issue has not yet been resolved by the courts below. The United States argued to the bankruptcy court that Section 106(b) is inapplicable because petitioners' claims do not arise out of the same transaction or occurrence as the government's claims against the bankruptcy estate. 11 U.S.C. 106(b). Should this case be remanded, the government would expect to reassert that argument.

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No. 04-1462

IN THE

Supreme Court of the United States

FRANKLIN SAVINGS CORP. *et al.*,

Petitioners,

v.

UNITED STATES *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY BRIEF	1
I. THE DECISION BELOW CONFLICTS DIRECTLY WITH A DECISION OF THE FIFTH CIRCUIT, AS THE GOVERNMENT CONCEDES	1
II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE FOURTH, SIXTH AND NINTH CIRCUITS CONCERNING THE RELATIONSHIP BETWEEN § 106 AND THE FTCA	3
III. THE DECISION BELOW FURTHER CONFLICTS WITH DECISIONS OF THIS COURT, AND OF THE THIRD, FOURTH, SIXTH AND ELEVENTH CIRCUITS, CONCERNING THE NATURE AND PURPOSE OF THE FTCA	7
IV. THE GOVERNMENT'S ADDITIONAL ARGUMENTS PROVIDE NO BASIS FOR DENYING REVIEW	8
CONCLUSION	10

TABLE OF AUTHORITIES

CASES — Page

Anderson v. *FDIC*, 918 F.2d 1139 (4th Cir. 1990) 3, 4, 6
Ashbrook v. *Block*, 917 F.2d 918 (6th Cir. 1990) 3, 4
FSC v. *OTS*, 303 B.R. 488 (D. Kan. 2004) 1
Feres v. *United States*, 340 U.S. 135 (1950) 7
Florida Auto Auction of Orlando, Inc. v. *United States*, 74 F.3d 498 (4th Cir. 1996) 7
In re Orthopedic Bone Screw Prod. Liab. Litig., 264 F.3d 344 (3d Cir. 2001) 7
Sullivan v. *Town & Country Home Nursing Servs. Inc. (In re Town & Country Home Nursing Servs. Inc.)*, 963 F.2d 1146 (9th Cir. 1991) 3, 4
Sun Oil Co. v. *Wortman*, 486 U.S. 717 (1988) 4
University Med. Ctr. v. *Sullivan (In re University Med. Ctr.)*, 973 F.2d 1065 (3d Cir. 1992) 3
Zayler v. *USDA (In re Supreme Beef Processors)*, 391 F.3d 629 (5th Cir. 2004) 1, 2, 6

FEDERAL STATUTES

11 U.S.C. § 106 ..... 5, 7
28 U.S.C. § 2675 5
§ 2401(b) 5

RULES

Fed. R. Civ. P. 8(a) 6
41(b) 9

OTHER AUTHORITIES

Black's Law Dictionary (8th ed. 2004) 6
Restatement (Second) of Judgments (1982) 9

TABLE OF AUTHORITIES—continued

Page

U.S. Court of Appeals for the Fifth Circuit, *Statistical Snapshot*, *at* http://www.ca5.uscourts.gov/clerk/APPENDIXIREV.pdf (last visited July 18, 2005) 2

REPLY BRIEF

The government concedes that the decision below squarely conflicts with a decision of the Fifth Circuit. As the Petition further demonstrates, the decision below conflicts with the decisions of at least three other courts of appeals on one issue, and decisions of this Court and four courts of appeals on a second issue. And the government fails to dispute that the issue presented is both important and worthy of the Court's attention. Instead, it briefly argues that review "is ... not warranted at this time," Opp. 14, and spends only slightly more time contending that the circuit split is not as deep as Petitioners assert, *id.* at 14-17. But it devotes virtually its entire effort to arguing the underlying facts and merits, *id.* at 4-8, 8-13, 17-18,[1] instead of addressing whether certiorari should be granted to resolve the acknowledged and unquestionable conflict in the circuits presented in the petition. Page limits do not permit a full opportunity to respond to all of the government's arguments for affirmance, but in the process of answering the government's few points that are directed to certiorari, Petitioners will demonstrate why the government's most extreme claims do not withstand scrutiny. In the end, it is plain that this Court's review is necessary to resolve the multiple conflicts on important questions of federal law that are presented in this case.

I. THE DECISION BELOW CONFLICTS DIRECTLY WITH A DECISION OF THE FIFTH CIRCUIT, AS THE GOVERNMENT CONCEDES.

The Petition shows, Pet. 10-11, and the government agrees, that the decision below stands in square conflict with the Fifth Circuit's decision in *Zayler* v. *USDA (In re Supreme Beef Processors)*, 391 F.3d 629 (5th Cir. 2004). In *Zayler*, the

[1] For instance, the government mistakenly asserts that Franklin Savings was a "failed" institution. On the contrary, it is res judicata that FSA was in capital compliance at the time a conservator was appointed. *FSC* v. *OTS*, 303 B.R. 488, 500-01 (D. Kan. 2004).

Fifth Circuit rejected the government's argument that a claim can proceed under 11 U.S.C. § 106 only if it meets the statute of limitations embedded in the Federal Tort Claims Act (FTCA). See 391 F.3d at 635-36. That holding conflicts directly with the decision below, in which the Tenth Circuit accepted the government's argument foursquare, and held that the FTCA's statute of limitations applies to claims brought under § 106. See Pet. App. 13a; see generally *id.* 12a-17a.

The government does not dispute that the issue presented is important. In fact, it appears to concede as much, arguing only that review "is ... not warranted *at this time*." Opp. 14 (emphasis added). This is with good reason. As the Petition shows, Pet. 17-20, this case presents important issues related to the scope of the United States' sovereign immunity and the jurisdiction of the federal courts—issues as to which the current state of disuniformity is illogical, unjust and intolerable. For exactly these reasons, this Court repeatedly has granted review to construe the FTCA, as the government itself recently has argued, see Petition for a Writ of Certiorari at 22-23, *United States* v. *Olson*, No. 04-759 (U.S. filed Dec. 3, 2004) (noting grants of certiorari in FTCA cases), *cert. granted*, 125 S. Ct. 1591 (2005).

The government's sole response to this admitted conflict is that the Court should not grant certiorari because the government has sought rehearing en banc in *Zayler*. Opp. 17. This is a slim reed indeed. *First*, it is most unlikely that the Fifth Circuit will grant rehearing en banc. That court, in the twelve months ending June 30, 2004, handled nearly 8,500 cases, but reheard only 11 cases en banc—approximately one one-thousandth of its docket. See United States Court of Appeals for the Fifth Circuit, *Statistical Snapshot, at* http://www.ca5.uscourts.gov/clerk/APPENDIXIREV.pdf (visited July 12, 2005). *Second*, this argument is no basis to deny certiorari in any event. The logical consequence of the argument—even were it not premised on infinitesimal odds—is that this petition should be held pending the Fifth Circuit's resolution of

Zayler.[2] *Third*, as the following section demonstrates, review of this case is warranted in any event: Even leaving aside *Zayler*, there exists a square conflict between the decision below and decisions of the Fourth, Sixth and Ninth Circuits.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE FOURTH, SIXTH AND NINTH CIRCUITS CONCERNING THE RELATIONSHIP BETWEEN § 106 AND THE FTCA.

As explained in the Petition, the holding of the Tenth Circuit in this case conflicts with *Anderson* v. *FDIC*, 918 F.2d 1139 (4th Cir. 1990); *Ashbrook* v. *Block*, 917 F.2d 918 (6th Cir. 1990); and *Sullivan* v. *Town & Country Home Nursing Services, Inc. (In re Town & Country Home Nursing Services, Inc.)*, 963 F.2d 1146 (9th Cir. 1991). See Pet. 11-13.[3] In each of those three cases, the court of appeals held that the limitations that attend an action brought under the auspices of the FTCA do not apply to a claim brought under § 106. *Anderson*, 917 F.2d at 1143-44; *Ashbrook*, 917 F.2d at 922-24; *Sullivan*, 963 F.2d at 1153-54. That reasoning directly conflicts with the decision below, which held that the FTCA's limitations *do* apply to claims brought under § 106.

1. The government seeks to distinguish *Anderson*, *Ashbrook* and *Sullivan* in two ways. It first argues that those cases concern whether a debtor proceeding under § 106 must "comply with the *procedural* requirement of exhausting administrative remedies." By contrast, the government contends, the decision below relates to "the *substantive* requirements and limitations of the FTCA, including the statute of

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[2] Petitioners will inform the Court immediately if the Fifth Circuit takes further action in *Zayler* during the pendency of this petition.

[3] And, as the Petition notes, the conflict is exacerbated by a decision of the Third Circuit applying the same reasoning in a closely analogous context, *see University Med. Ctr.* v. *Sullivan (In re Univ. Med. Ctr.)*, 973 F.2d 1065, 1072-73 (3d Cir. 1992), and it is mirrored by widespread confusion in the bankruptcy courts, *see* Pet. 14-15 & n.7.

limitations or the discretionary function exception." Opp. 15. This supposed distinction between "substantive" and "procedural" requirements is wholly of the government's own creation, and appears nowhere in the cases. Rather, each case states generically and holds categorically that the FTCA's limitations are inapplicable to claims brought under § 106. For example, in *Anderson*, 918 F.2d at 1144, the court stated in blanket fashion that "by the assertion of its claim against the estate, the FDIC waived the protections it otherwise enjoys, both under the doctrine of sovereign immunity and under the Tort Claims Act."[4] This language is clear, and invites no distinction between procedure and substance. These precedents apply to the FTCA's statute of limitations just as they do to the FTCA's exhaustion requirement, and in so doing, conflict with the decision below.

The existence of this conflict is confirmed, and the fallacy of the government's claimed distinction between "substantive" and "procedural" requirements highlighted, by the government's inability to support this proposed distinction with any principle of law or logic. Instead, it baldly asserts that there is such a distinction, an approach that this Court has expressly rejected: "Except at the extremes, the terms 'substance' and 'procedure' precisely describe very little except a dichotomy, and what they mean in a particular context is largely determined by the purposes for which the dichotomy is drawn." *Sun Oil Co.* v. *Wortman*, 486 U.S. 717, 726 (1988).[5]

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[4] *See also Sullivan*, 963 F.2d at 1155 ("At the time of the Bankruptcy Code's passage, Congress was aware that its prior enactments, such as the FTCA, had already prescribed certain conditions for the government's waiver of sovereign immunity. The legislative history of section 106 indicates that Congress meant to alter this landscape by subjecting the government to an automatic exposure to liability as the price of its participation in the distribution of the bankruptcy estate."); *Ashbrook*, 917 F.2d at 923.

[5] *Sun Oil* also holds that a statute of limitations may be "procedural" for purposes of the Full Faith and Credit Clause. 486 U.S. at 728-29.

Moreover, in this context, there is no basis to characterize the statute of limitations as substantive but the exhaustion requirement as procedural, because the FTCA intertwines the two requirements. A tort claim brought under the auspices of the FTCA must first be exhausted with the relevant agency. 28 U.S.C. § 2675. This exhaustion requirement is subject to a two-year statute of limitations, and any subsequent civil suit must be filed within six months after the agency denies the administrative claim. *Id.* § 2401(b). Given this close relationship between the FTCA's statute of limitations and its administrative exhaustion requirement, there is no meaningful basis for describing one of the requirements as substantive and the other procedural. Absent this contrived distinction, the conclusion is inescapable that the decisions of the Fourth, Sixth and Ninth Circuits are flatly inconsistent with the Tenth Circuit's decision in this case. That conflict warrants this Court's review.

2. The government next seeks to narrow the conflict by arguing, Opp. 14-15, that the contrary decisions of the Fourth, Sixth and Ninth Circuits were abrogated by the 1994 enactment of § 106(a)(5). That subsection provides that § 106 does not "create any *substantive claim for relief* or *cause of action* not otherwise existing under this title, the Federal Rules of Bankruptcy Procedure, or nonbankruptcy law" (emphasis added). The government's theory, largely unexplained, appears to be that if the FTCA's statute of limitations does not apply to § 106 claims, this broadening of federal tort liability amounts to "creat[ing] [a] substantive claim for relief or cause of action," in contravention of § 106(a)(5). See, *e.g.*, Opp. 16. This argument depends upon the mistaken assertion that § 106 can in no way "expand[] the substantive liability of the United States," *id.*, and relies upon a misinterpretation of the statute's terms.

Section 106(a)(5) simply does not mean that liability under § 106 can never be broader than under other waivers of sovereign immunity (as would be the case, for instance, by hold-

ing inoperative the FTCA's statute of limitations to § 106 claims). Rather, it merely provides that § 106 does not create a "claim for relief" or a "cause of action." These terms have well defined meanings that differ markedly from what the government suggests—*viz.*, they are "[a] group of operative facts giving rise to one or more bases for suing" or a "legal theory of a lawsuit." *Black's Law Dictionary* 235 (8th ed. 2004) (defining "cause of action"); Fed. R. Civ. P. 8(a) (referring to "claim for relief" as "an original claim, counterclaim, cross-claim, or third-party claim"). In short, § 106(a)(5) states explicitly what is implicit in § 106(b) and (c)—that § 106 is only a waiver of sovereign immunity, and does not create a new right of action. That the FTCA's statute of limitations does not apply to claims brought under § 106 in no way means that § 106 is "creat[ing]" a claim for relief or a cause of action; it simply means that certain *existing* causes of action (specifically, claims arising under state law that may be brought against the government because of the § 106 waiver of sovereign immunity) carry a different limitations period than they would if they were brought pursuant to the FTCA.

The error in the government's interpretation of § 106(a)(5) is confirmed by the fact that it would render § 106(b) and (c) superfluous. Pet. 11. If, as the government contends, § 106(a)(5) means that § 106 can in no way "expand[] the substantive liability of the United States" beyond what the FTCA already permits, Opp. 16, then those provisions are surplusage. See *Zayler*, 391 F.3d at 636; *Anderson*, 918 F.2d at 1143-44. It is no response to argue, as the government does, that there is no such problem because § 106(b) and (c) operate to grant the bankruptcy courts jurisdiction over "action[s] against a state governmental entity" and "tort claims against the federal government." Opp. 12 n.2. It would be unusual indeed if Congress intended to confer jurisdiction on the bankruptcy courts, not by saying "the bankruptcy courts shall have jurisdiction," but instead by enacting statutory provisions that speak purely about sovereign immunity, as

§106(b) and (c) do. And it would be all the more surprising if this were the purpose of those provisions, when § 106(a)(2) specifically grants the bankruptcy courts such jurisdiction. See 11 U.S.C. § 106(a)(2) ("The court may hear ...."). In short, the government's argument on this score falls entirely flat. Section 106(a)(5) in no way abrogates *Ashbrook*, *Anderson* and *Sullivan*, which remain good law; those cases stand in direct conflict with the decision below; and they therefore confirm the need for this Court's review.

III. THE DECISION BELOW FURTHER CONFLICTS WITH DECISIONS OF THIS COURT, AND OF THE THIRD, FOURTH, SIXTH AND ELEVENTH CIRCUITS, CONCERNING THE NATURE AND PURPOSE OF THE FTCA.

In addition to the conflict concerning the relationship between the FTCA and § 106, the Petition also demonstrates that the decision below conflicts with decisions of multiple courts—including this Court—as to whether the FTCA is itself a cause of action. Pet. 15-17. The decision below erroneously treated the FTCA as a "source" of "substantive" law—i.e., a cause of action. The government does not dispute this fact, nor could it. See Pet. App. 8a ("That outside source [of law] is the FTCA when, as here, the claim sounds in tort."). What is more, the government itself appears to embrace this position, as it refers to the FTCA as "impos[ing] substantive liability on the United States," Opp. 11, and as "creat[ing] ... the United States' substantive tort liability," *id.* at 12.

In direct conflict with the decision below, this Court and others have expressly held that the FTCA "is *not* the creation of new causes of action." *Feres* v. *United States*, 340 U.S. 135, 141 (1950) (emphasis added). The language of the courts of appeals is, like *Feres*, flatly unambiguous. See, *e.g.*, *In re Orthopedic Bone Screw Prod. Liab. Litig.*, 264 F.3d 344, 362 (3d Cir. 2001) ("the FTCA does not itself create a substantive cause of action"); *Florida Auto Auction of Or-*

lando, Inc. v. *United States*, 74 F.3d 498, 502 (4th Cir. 1996) ("The [FTCA] does not create new causes of action ...."); Pet. 16-17 (quoting additional cases). In short, there can be no reasonable dispute that these decisions conflict with the decision below.

The government's sole response is a distraction. There is no conflict, it argues, because these decisions merely stand for the proposition that the federal government's tort liability is limited to "traditional common-law tort liability" applicable to private persons, and "does not extend to" other forms of liability, such as liability that is imposed upon state and municipal entities. Opp. 13. Even assuming this is true, it is beside the point.[6] That these decisions may address "private-person" liability hardly means that they cannot also address the predicate question whether FTCA creates a cause of action. And, it is manifestly plain from the language quoted above that they do exactly that. These cases squarely hold that the FTCA is not a substantive cause of action, but merely a waiver of sovereign immunity that permits state-law claims to be brought against the United States. In this regard they conflict squarely with the decision below, and further confirm the need for this Court's review.

IV. THE GOVERNMENT'S ADDITIONAL ARGUMENTS PROVIDE NO BASIS FOR DENYING REVIEW.

The remainder of the government's brief concerns itself with the underlying merits of the case. These arguments are beside the point. That the government thinks it has the better of the merits does nothing to eliminate the problem that this case would not have been dismissed if it had arisen in the more than 20 States encompassed within the four circuits that conflict with the Tenth Circuit.

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[6] It is undisputed that the claims brought by Franklin Savings pass this private-plaintiff test.

What is more, the government's arguments are mistaken. Although it is surely correct that liability against the United States requires both "a waiver of sovereign immunity *and* a source of substantive law that establishes a cause of action," Opp. 9, contrary to what the government asserts, both are present here. Section 106(b) and (c) waive the government's immunity with regard to claims in bankruptcy, and state law is the source of substantive law. The government's repeated suggestion that only the FTCA, but not state law, can be the source of substantive tort law where the United States is concerned, *e.g.*, *id.* at 11, 12, has no basis. It is quite irrelevant that "[s]tate law ... *generally* provides no cause of action against the United States," *id.* at 10 (emphasis added), for that principle falls by the wayside when sovereign immunity has been waived—as it has been here by § 106. Nor does the FTCA preempt state law, *id.*, precisely because the FTCA's limited waiver of sovereign immunity is inapplicable and irrelevant when, as here, the plaintiff's claim rests upon a separate waiver of sovereign immunity.[7]

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[7] The government's suggestion that Petitioners' claim is barred by res judicata, Opp. 17, is likewise inapposite. The government itself twice concedes that the "court of appeals did not reach the issue." *Id.* at 18; *see also id.* at 7. This issue is not encompassed in the Question Presented (either Petitioners' or the government's); it in no way affects the underlying conflicts that warrant this Court's attention; and the argument is mistaken in any event, as a dismissal for lack of jurisdiction does not have res judicata effect, even assuming the other elements of res judicata have been met. *Restatement (Second) of Judgments* § 20(1)(a) (1982); Fed. R. Civ. P. 41(b). Nor is the government's argument concerning the statute of limitations any more forceful. At a minimum, Franklin Savings' counterclaims are timely as to the government's claims filed in 1995, 1998, and 1999, even leaving aside questions of tolling.

The related insinuation that Petitioners have somehow taken up more than their fair share of judicial resources, Opp. 18, barely merits response. Suffice it to say that the federal government destroyed hundreds of millions of dollars of value when it tortiously seized and liquidated Franklin Savings—all as a result of the government's inability to understand Franklin Savings' business model—and Petitioners are unembarrassed by their legitimate efforts to regain what was wrongfully taken from them.

* * * *

The decision below badly misunderstands the nature and operation of the Federal Tort Claims Act. The decision conflicts with four circuits in holding that the limitations of the FTCA apply to claims brought under § 106, and further conflicts with decisions of this Court and four circuits in mistakenly concluding that the FTCA provides a cause of action. These important questions require clarity and uniformity, and merit this Court's review in this case.

CONCLUSION

For the foregoing reasons and those set forth in the Petition, the Petition for a Writ of Certiorari should be granted.

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